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PRACTICE REPORTS

IN THE



S U P R E M E C O U R T

AND

COURT OF APPEALS

OF THE

STATE OF NEW-YORK.

BY NATHAN HOWARD, JR.,
COUNSELLOR-AT-LAW, NEW-YORK.

VOLUME XIX.

0

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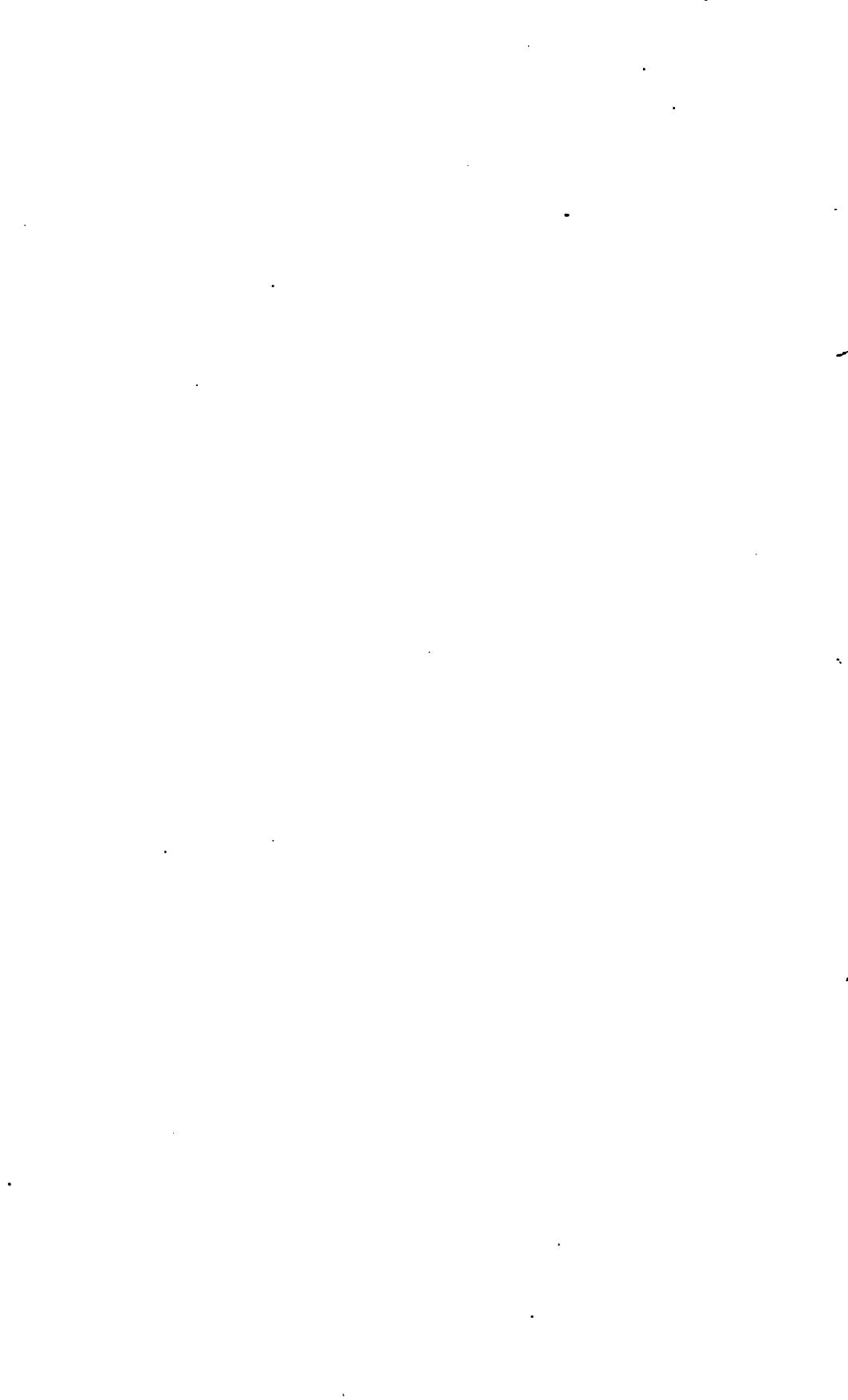
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COURT OF APPEALS.

BAGLEY agt. SMITH and another.

An action can be maintained by one *partner* against another for a breach of a covenant to continue a partnership between them for a fixed period.

The *measure of damages* depends on the *extent of the injury* in these, as well as in all other cases of broken covenants.

And the loss of profits is one of the common grounds, and the amount of prospective profits one of the common measures of damages to be given upon a breach of such contract.

Evidence of the *past profits* of the copartnership may be given, as bearing upon the amount of prospective profits.

The claim for damages is not absolutely limited to the profits which would have been made between the time of the wrongful dissolution of the copartnership and the time when the plaintiff commenced business anew on his own account.

A *request to charge the jury* must be in such form that the judge may properly charge in the terms of the request, without qualification, or his refusal will not be error.

An objection which does not appear by the *bill of exceptions* to have been taken on the trial, cannot be considered on appeal.

June Term, 1853.

APPEAL from the judgment of the court below.

A witness being asked on the part of the plaintiff what the profits of the firm of A. G. Bagley & Co. were during the last six months of its existence, the inquiry was objected to on the part of the defendants, and the objection overruled by the judge who tried the cause, he holding it to be proper to allow the inquiry as to actual damages and as to loss of profits, the latter being admitted not as furnishing the rule of damages, but as evidence,

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from which the jury might form a judgment. To this ruling there was an exception by the defendants. The grounds of objection were, that for the breach of co-partnership articles no damages, or, at most, only nominal damages could be recovered; that by the constitution of the partnership, the partners have a power of revocation whenever they lose confidence in each other; that prospective profits form no ground of damages at all; that at the common law no such rule of damages is known, and that if damages were recoverable at all, on the ground of loss of profits, they must be limited to the period between the 10th of August, when the notice of dissolution was given, and the 26th of August, when the plaintiff went on again in business on his own account. At the close of the plaintiff's evidence, a non-suit was asked, upon the grounds stated in these objections, and upon the further ground that upon the evidence a good cause for dissolving the firm was shown, Bagley having drawn out of the firm, in six months, \$1,684.50, when he was only authorized to draw \$2,420 per annum. The non-suit was refused, and defendants excepted. After the judge had charged the jury, he was requested by defendant's counsel to charge, first, that damages were not recoverable for breach of the agreement; second, that if allowed at all, they must be limited to the time before Bagley resumed business; and last, that supposing Bagley accountable, through want of diligence (for losses happening in his department of the business), this ought to be taken into view in diminution of his damages. The judge refused to alter his charge, and to this refusal there was an exception, as well as to the charge, that the profits might be taken into consideration in estimating the damages.

D. P. HALL and DANIEL LORD, *for appellants.*
EDWARD SANDFORD, *for respondent.*

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JOHNSON, J. The principal points presented by the exceptions in this case are, first, whether an action can be maintained for a breach of a covenant to continue a partnership for a fixed period, unless sooner dissolved, in accordance with the terms of the covenant; second, whether actual damages can in such case be recovered; third, whether expected profits can be regarded as a ground of damages in such a case; and fourth, whether the amount of profits made prior to the dissolution could be considered by the jury as bearing in any degree upon the amount of damages to which the plaintiff was entitled. Another objection was presented on the argument, that the covenants of the defendants being several, no judgment for joint damages could be given. This objection not having been presented at the trial, so far as the bill of exceptions informs us, cannot be considered here.

There do not seem to be any special rules of law applicable to covenants contained in partnership articles, and not to other covenants, and we may therefore say, without discussion, that an action will lie for a breach of covenant, no matter in what instrument the covenant be found. We may further affirm that no rule of law declares that the breach of a covenant contained in partnership articles shall be compensated only by nominal damages. The measure of damages must depend on the nature of the obligation, and the extent of the injury in this as in all other cases of broken covenants.

No question was made at the trial as to the sufficiency of the proof that a breach of the obligation to continue the partnership had taken place, except only so far as a question of that sort is raised by the objection of the defendants' counsel, that by the constitution of the partnership the partners have a power of revocation whenever they lose confidence in each other. It is not quite clear whether this objection points to the particular frame of this partnership, or is supposed to be founded upon the

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general rules applicable to that relation. If it relate to the provisions of the partnership agreement in this case, then it is clear that the articles contain no clause which warrants the defendants' proposition; and, on the other hand, if the general law of partnership is referred to, while it must be conceded that some difference of opinion seems to exist as to the power of either partner, in a partnership for a fixed term, contrary to his agreement, to put an end to the continuance of the firm at his own mere will, it can be safely affirmed that conceding this power to exist in the broadest form, it has never been pretended that a partner who should, in contravention of his agreement, put an end to the partnership, would not be held responsible for the injury thus committed.

We are left, then, to the only substantial question which this case presents: whether the loss of those profits which the plaintiff would have made during the stipulated term of the partnership is a proper subject of compensation, and whether the evidence of past profits, during the period next preceding the dissolution, can be considered as bearing upon the question of prospective profits. The form of the exceptions taken concedes that the judge committed no error, unless in taking the profits into consideration at all; that if he was correct in this, he has annexed to his instructions all the proper qualifications to prevent an excessive and erroneous estimate of the amount of compensation for prospective profits.

The object of commercial partnerships is profit. This is the motive upon which men enter into the relation. The only legitimate beneficial consequence of continuing a partnership is the making of profits. The most direct and legitimate injurious consequence which can follow upon an unauthorized dissolution of a partnership, is the loss of profits. Unless that loss can be made up to the injured party, it is idle to say that any obligation is imposed by a contract to continue a partnership for a

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fixed period. The loss of profits is one of the common grounds, and the amount of profits lost, one of the common measures of the damages to be given upon a breach of contract. I need only refer to *Marterson vs. Brooklyn* (7 Hill, 62). So, too, in *Wilson vs. Martin* (1 Den., 602); *Hecksher vs. McCrea* (24 W., 304); and *Shannon vs. Comstock* (21 W., 457). What the party would have made, in other words, his prospective profit from the performance of the contract, was held to be the true measure of damages. I refer also to two English cases on the question, although the English courts do not seem so carefully to have considered the rules by which, as matter of law, damages are to be measured, as the courts in this country.

Gale vs. Leckie (2 Stark., 107), was at *nisi prius* before Lord ELLENBOROUGH. Defendant agreed, as author, to furnish a manuscript work to plaintiffs, to be published at their expense, and the profits to be equally divided. The defendant failed to fulfill, and this action was brought for damages. Lord ELLENBOROUGH told the jury the plaintiffs were entitled to their expenses of paper and printing, and added "the sum of £90 has been stated by the witnesses as the amount of profits which would probably have been derived from the first edition; and it is doubtful whether it would have reached a second;" after suggesting that there might have been a loss instead of profit, which would have been wholly the plaintiffs' loss under the contract, he submitted the matter to the jury, who found for the plaintiffs £50 more, the expense, &c., for loss of profit. The case does not appear to have been moved afterwards. *McNeil vs. Reid* (9 Bing., 68) was an action upon a contract, by defendant, to take plaintiff into a firm of which defendant was a member. It appeared, upon the trial, that the plaintiff had been offered upon certain terms, the command of an East India ship for a double voyage; that the value of such a voyage to the captain was not less than

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£1,000; that the plaintiff had been induced by defendant to give up this voyage to enter into the promised partnership. The jury found £500 for plaintiff. It was objected, among other things, that the jury were wrongly instructed as to damages. On this point TINDEL, C. J., says: "I told the jury that they might see that the plaintiff considered the engagement equal to an Indian voyage, because he would not otherwise have relinquished it, and the defendant could not have estimated it at less, because he made his offer as a friend of the plaintiff." It was the value of the engagement as partner, therefore, which the jury were to estimate; and BOSANQUET, J., says: "The damages were estimated according to what the jury thought was the value of the contract. The value of the East India voyage has not been recovered as special damage, but has been taken as an ingredient for estimating the value which each party set on the proposed contract of partnership." In each of these cases the prospective profits of a joint undertaking unperformed, was made the subject of compensation in damages in an action at law.

The next question relates to the admission of the evidence of the amount of past profits, to be considered by the jury as bearing upon future profits. It will be observed that the objection does not at all relate to the mode of proof, but only to the competency of the fact. It seems to me quite obvious that outside of a court of justice no man would undertake to form an opinion as to the prospective profits of a business, without, in the first place, informing himself as to its past profits, if that fact were accessible. As it is a fact in its nature entirely capable of accurate ascertainment and proof, I can see no more reason why it should be excluded from the consideration of a tribunal called upon to determine conjecturally the amount of prospective profits, than proof of the nature of the business, or any other circumstance connected with its transaction. It is very true that there is great diffi-

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culty in making an accurate estimate of future profits, even with the aid of knowing the amount of the past profits. This difficulty is inherent in the nature of the inquiry. We shall not lessen it by shutting our eyes to the light which the previous transactions of the partnership throw upon it. Nor are we the more inclined to refuse to make the inquiry, by reason of its difficulty, when we remember that it is the misconduct of the defendants which has rendered it necessary.

Another question arises upon the defendants' third request to charge, *viz.*, "That supposing Bagley to be accountable, through want of diligence, that should be taken into view in diminution of the damages."

An issue had been formed upon the pleadings, and tried, whether Bagley had fraudulently abstracted a quantity of gold from the firm, and the judge had instructed the jury that if they found this issue for the defendants, then they were justified in dissolving the partnership, and the plaintiff could not recover damages. No issue had been made as to negligence on Bagley's part, nor did the evidence tend to the proof of such negligence; and on these grounds, as well as because the request was not in such a shape, even conceding it to have been well founded upon the evidence, as to require the judge to comply with it, we think the exception not well taken. A request must be in such form that the judge may properly charge in the terms of the request as made, without qualification, or his refusal will not be ground of error. If made, as requested here, the effect would have been to submit to the jury, to find whether Bagley was accountable, through want of diligence, without any instructions as to what sort of diligence he was bound to exhibit, or what sort of losses or other mishaps he was thus to be made accountable for. In this refusal there was no error.

It may be proper to notice briefly the proposition that plaintiff's claim for profits, must be limited to the period

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between the dissolution and his subsequent entry into business. This is obviously unfounded. The only question which could be made as to this part of the case, is whether the defendants, in mitigation of damages, could show that the plaintiff either was or might have been as profitably employed in business on his own account, as he would have been had the firm business been continued. The plaintiff might, perhaps, have disputed the competency of such evidence. But surely the defendants cannot be heard to say that the plaintiff was bound to remain idle at their expense, or lose his claim upon them altogether, from the moment when he engaged in business.

Judgment affirmed.

NEW YORK SUPERIOR COURT.

WRIGHT F. CONGER *et al.* DANIEL H. SANDS AND AARON V. PARADISE.

Where a judgment creditor has proceeded to the examination of the judgment debtor in supplementary proceedings, with the usual injunction, and obtained an order appointing a receiver, and an order entered by consent, that the receiver's bond filed in another action against the same defendant (the receiver being the same in each case), be deemed sufficient, and that no other be required, does not obtain a *prima facie* lien on the funds in the hands of the receiver appointed in actions previously brought by other judgment creditors, and judgments obtained setting aside an assignment made by the defendants to an assignee for the benefit of creditors.

And, *it seems*, that he could not acquire any lien in such proceedings until the appointment of a receiver was completed therein by the *filings of his bond*, such receiver not being appointed until a lien was obtained in the other actions.

Special Term, March, 1860.

On the 24th day of November, 1858, Randolph and others commenced an action in the supreme court, as judgment creditors of Sands and Paradise, to set aside an assignment made by Sands and Paradise to one John Dean,

Conger agt. Sands & Paradise.

for the benefit of their creditors, and enjoined the assignor and assignee from disposing of any of the property of Sands and Paradise; and on the 17th day of December, 1858, obtained the appointment of Luther R. Marsh, Esq., as receiver of the assigned and other effects of the judgment debtors.

On the 30th day of November, 1858, two other actions were commenced in the same court for the same object, against the assignor and assignee, by other judgment creditors, to wit, one by Henry M. Lewis, and the other by Vernon Brothers; but no injunction was obtained in either action, and no receiver appointed till the rendering of the final judgment thereon, on the 11th March, 1859.

On the 2d day of December, 1858, Conger, the plaintiff, commenced supplementary proceedings upon a judgment he had recovered against Sands and Paradise, and served upon them an order for them to appear and be examined on a subsequent day, with the usual injunction; and after an examination of the defendants, entered an order on the 21st day of December, 1858, appointing L. R. Marsh, Esq., receiver, upon his filing an approved bond. No bond was ever filed in pursuance of this order, but on the 14th day of January, 1859, an order was entered, by consent of both parties, that the bond already filed by the receiver in the suit of Randolph, be deemed sufficient, and that no other be required. Nothing further was ever done in these proceedings, and no action commenced by the receiver or the plaintiff to set aside the assignment.

On the 3d day of December, 1858, Cyrus W. Field & Co. commenced an action in this court against Sands & Paradise, and their assignee Dean, to set aside the above assignment; but obtained no injunction nor order for the appointment of a receiver until final judgment, which was rendered on the 5th day of April, 1859, declaring the assignment void, appointing L. R. Marsh receiver, and

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directing the payment of the plaintiff's judgment by the receiver, out of the assets of Sands & Paradise.

The several actions of Randolph and others, H. M. Lewis, and Vernon Brothers, were tried on the same day, and judgments respectively entered on the 11th day of March, 1859, declaring the assignment fraudulent and void, and directing the above named receiver to pay their respective judgments and costs.

All the assets that came into the hands of the receiver were derived from Dean, the assignee, into whose possession they had come, under the assignment of Sands & Paradise.

The judgment of Randolph and others had been paid by the receiver, there being no question as to its priority over all the others.

The plaintiff, Conger, now moved for the appointment of a referee, to ascertain the priorities of the several liens upon the funds and assets in the receiver's hands, and for their payment according to such priorities.

J. Edgar, for plaintiff.

J. D. & T. D. Sherwood, for H. M. Lewis.

LEWIS B. REED, JR., for Vernons.

DUDLEY FIELD, for C. W. Field & Co.

ROBERTSON, Justice. I do not think the applicant in this case has obtained any lien on the funds in the hands of the receiver appointed in the actions brought to set aside the assignment made by the defendant, Sands & Paradise, to John Dean. As against all the world except creditors, proceeding directly to attack such assignment, John Dean is the owner of such assets, and the receiver is bound to pay them to him, unless a creditor intervene and commence a suit to vacate the assignment as against him.

The plaintiff, Conger, has only obtained such a lien as proceedings in a supplementary examination of a judgment

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debtor could give him, which is no more than such debtor could voluntarily give him, and he (the debtor) could not deprive Dean of his rights.

It is more than doubtful, too, whether he could acquire any lien in such proceedings until the appointment of a receiver was completed therein by the filing of his bond (*Voorhies agt. Seymour*, 26 *Barb.*, 570); and such receiver was not appointed until after a lien was obtained in the other actions. (*Edmonston agt. McLoud*, 16 *N. Y. Rep.*, 543.) I think, therefore, there is no ground for ordering a referee, as the applicant does not make out a *prima facie* case of lien.

The motion is denied, without costs.

—————♦—————

NEW YORK COMMON PLEAS.

**THE PEOPLE ex rel. GEORGE DOYLE agt. R. H. JOHNSTON,
Clerk of New York Special Sessions.**

Where a party accused of petit larceny, or assault and battery, is brought before the special sessions of the city of New York, and enters into a recognizance for his appearance at the general sessions, it must be regarded as an election by him, and as a recognition by the magistrate of his election, to be tried at the *general sessions*, and the special sessions thereafter has no jurisdiction of the case.

And this is so, whether the accused was informed or not by the magistrate or the clerk of special sessions, that it was his privilege to elect to be tried at the general sessions, as required by the act of 1855. (*Law of 1855*, p. 618.)

New York Special Term, April, 1860.

MOTION to discharge defendant from commitment at special sessions.

DALY, F. J. Under the Revised Statutes (2 *Rev. Stat.*, 4th ed., p. 899, § 24) a party accused of petit larceny, or

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assault and battery, might, after he had given a recognizance to appear at the general sessions, demand to be tried at the special sessions; for it was declared by the twenty-fourth section above referred to, that if a person accused of either of these offences should be required to enter into a recognizance to appear before the proper court to answer such charge, that he might *at any time* demand to be tried by the special sessions, upon which the court was required to proceed to hear and determine the accusation. Before the act of 1855, therefore, I presume it was the practice in every case where the accused was admitted to bail and wished to be tried at the special sessions, to take a recognizance for his appearance at the general sessions, and if he failed to appear at the special sessions, to have him indicted, and if he neglected to appear at the general sessions to answer the indictment, to forfeit his recognizance. The special sessions obtained jurisdiction, if the accused did not require to be tried at the general sessions, or did not, within twenty-four hours after being committed on the charge, enter into a recognizance for his appearance at the next court of general sessions, or if having entered into such recognizance, he saw fit thereafter to demand to be tried by the special sessions. The object of these provisions was to enable the party accused of these petty offences to have a more speedy trial if he desired it. But the act of 1855 made a very material change. (*Laws of 1855*, p. 613.) It greatly enlarged the powers of the special sessions, by declaring that it should have exclusive jurisdiction of all misdemeanors, unless it should order the complaint to be heard at the general sessions, or unless the accused, when arrested and brought before the committing magistrates, should elect to have his case heard and determined by the general sessions; and it was made the duty of the magistrate to inform him of this provision. If Doyle had been informed of his rights by the magistrate, or by Johnston, the clerk, and he made no election, it was

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the duty of the magistrate to commit him for trial at the special sessions, or take a recognizance for an appearance before that court. There seems to have been a doubt of the right to take a recognizance for an appearance at the special sessions, to remove which the act of 1859 was passed (*Laws of 1859*, p. 1129), which declares that if the accused elects to be tried at the special sessions, and is admitted to bail, a recognizance shall be taken for his appearance at that court. But there was no ground for such a doubt, for since the time of the passage of the act of Philip and Mary (6 *Evans' Statutes*, 252), in cases of petty larcenies and small felonies, the recognizance was certified to the quarter sessions (*Dalton's Justice*, 540; *Hugh Peterdorf on Bail*, 511), a tribunal for the trial of minor offences, analogous to our special sessions. The practice of taking a recognizance for the prisoner's appearance at the general sessions was, after the act of 1855, no longer necessary or proper, for the prisoner could not, as before, elect *at any time* to be tried by the special sessions. He was bound, after the passage of that act, to elect to be tried before the general sessions, when he was arrested and brought before the committing magistrate, and if he did not at that time so elect, the special sessions had exclusive jurisdiction. There was some reason, before the passage of the act of 1855, for taking the recognizance, in every case, for an appearance at the general sessions, but none thereafter. It matters not, therefore, whether Johnson, the clerk, informed Doyle of the provisions of the act of 1855 or not, a point that is contested in the affidavit. For when he entered into a recognizance before Justice Kelly for his appearance at the general sessions, it must be regarded as an election by him, and as a recognition by the magistrate of his election, to be tried at the general sessions. This being the case, the special sessions had no jurisdiction. He was not amenable to the process of that court, and must be discharged.

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NEW YORK SUPERIOR COURT.

BENJAMIN F. HOWE agt. JAMES H. SEARING.

The sale of the good will of a business does not transfer a right to the use of the vendor's name of trade. (MONCRIEF, J., dissenting.)

Where the plaintiff sold to the defendant's assignor his lease of the premises No. 432 Broadway, New York, known by the name of "Howe's Bakery," and stock in trade, with "the good will of the business of baking, now or heretofore carried on by me in the city of New York."

Held, that the plaintiff was entitled to an injunction, to restrain the defendant from designating such bakery establishment as "Howe's Bakery," and from otherwise using the name of "Howe" in the business, so as to induce the public to believe that the business carried on at 432 Broadway was conducted by Howe.

General Term, April, 1860. Present:

HOFFMAN, PIERREPONT and MONCRIEF, Justices.

This is an action brought by Mr. Howe, the celebrated baker, to restrain the defendant from designating the bakery establishment kept by him at No. 432 Broadway, New York, as "Howe's Bakery," and from otherwise using the name of Howe in the business, so as to induce the public to believe that the business carried on at 432 Broadway is conducted by Howe.

The action was tried some time since at special term, and upon the trial it was proved that about eight years ago Mr. Howe was carrying on this business at 432 Broadway, and had done a large and lucrative business there; and, during all the time he carried on the business, the premises had been known by the name of "Howe's Bakery," and that during that time they had gained great celebrity by that name; that about eight years ago Howe sold out his lease of the premises, and all the stock, wagons and fixtures used by him in the business, together with the "good will" of the concern, to one Baker, and covenanted not to resume the same business in the city of New York, without Baker's consent; that Baker thereupon

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commenced the same business at the same place, keeping up the old signs, and continuing to use the name of Howe upon the wagons and bread tickets, the same as his predecessor had done; that Howe at first assented to this use of his name in Baker's business, but after the lapse of some time remonstrated in a friendly way against it; that subsequently, and shortly before the commencement of this suit, Howe, desiring to return to the business, bought of Baker the privilege of resuming the business at 850 Broadway, covenanting, however, in the agreement then made, "*not in any manner to interfere with the business carried on at No. 432 Broadway, known as Howe's Bakery;*" that immediately after this agreement with Baker, Howe did resume his business of a baker at 850 Broadway, and has since continued the same there; that Baker afterwards sold out his lease, stock, wagons, fixtures, &c., used in the business at 432 Broadway, to Searing, the defendant in this action, conveying to him all the rights acquired by Baker by his purchase from Howe, subject to Howe's right to do business by virtue of the subsequent agreement alluded to; that afterwards the defendant continued the same business at the old stand, and also continued the use of the name of Howe on the signs, wagons, bread tickets, &c., used in connection with the business at 432 Broadway. It was also proved, on the trial, that the use of Howe's name by the defendant, as stated, was calculated to mislead the public, and had induced persons to deal at 432 Broadway, under supposition that they were dealing with Howe, who would otherwise have dealt at Howe's place.

Judgment was rendered in favor of the plaintiff, and a decree was entered in the action restraining the defendant from in any manner using Howe's name in the business at 432 Broadway.

From this judgment the defendant appealed to the general term. Plaintiff's proceedings to enforce the injunction have been stayed, in the meantime, by order of the court,

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and continue stayed until the determination of the appeal, defendant has taken to the court of appeals, from the judgment of the general term, recently entered.

The appeal to the general term was argued last fall before Judges HOFFMAN, PIERREPONT and MONCRIEF, and a decision has been recently rendered, and judgment has been entered thereon, affirming the judgment of the special term, Justices HOFFMAN and PIERREPONT being for affirmance, and Justice MONCRIEF dissenting.

LUTHER B. MARSH, *for appellant.*

The main points taken by appellant were,

1st. That the right to use Howe's name passed to Baker and his assigns, by the conveyance to Baker in the original agreement, of the "good will" of the concern.

2d. That by years of acquiescence in the use of the name by Baker, Howe had estopped himself from disputing the right of Baker's grantee to use it.

3d. That Howe's recognition of the premises as "Howe's Bakery," in his subsequent agreement with Baker, was conclusive evidence of what Howe understood had passed, and intended should pass, by conveyance of "good will."

LAWRENCE, WORRALL and MOSES ELY, *for respondent.*

By the Court, HOFFMAN, Justice. The first and the most important question in the cause is what right passed to Baker, under the sale and transfer to him in January, 1852, of the leasehold premises, stock and trade, with "*the good will of the business of baking, now or heretofore carried on by me in the city of New York.*"

The authorities referred to, do in general describe the good will of a trade "as a probability that the old customers will resort to the old place." Judge Story describes it as "the advantage or benefit which is acquired by an

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establishment beyond the mere value of the capital, stock, funds or property employed therein, in consequence of the general public patronage which it receives from constant or habitual customers, on account of its local position, or common celebrity, or reputation for skill, or affluence, or punctuality, or from accidental circumstances, or even from ancient partialities or prejudices." (*Story*, § 99.)

It is, I apprehend, a well settled rule, that the good will of a partnership business does not survive to a continuing partner. It belongs to the firm as much as the ordinary stock in trade, and must be disposed of in some manner for the benefit of the firm. The case of *Lewis* agt. *Langdon* (7 *Simons' R.*, 421), which seems to assert a different rule, is not the law of the court to this point, for which it is frequently cited. (*Story on Partnership*, § 99.)

But the decision turns upon the right to use the name of the old firm with a modification, and it is hereafter more particularly noticed.

Douglass agt. *Hammond* (5 *Vesey R.*, 539) does indeed explicitly decide that the good will, speaking of it generally, does survive to the remaining partner; that a sale of it cannot be compelled by the representative of the deceased partner; that it is not partnership stock of which the executor may compel a division, but belongs of right to the survivor.

In the case of *Dougherty* agt. *Van Nostrand* (1 *Hoffman's Ch. R.*, 68), before me, as assistant vice-chancellor, I thought that this case could not be supported.

I have acted at special term in this court on two cases, after a reconsideration of the point, upon the same principle as in *Dougherty* agt. *Van Nostrand*.

Vice-Chancellor *Sandford* in *Williams* agt. *Wilson* (4 *Sand. Ch. R.*, 379), decided in the same manner, recognizing *Dougherty* agt. *Van Nostrand*.

Good will resolves itself into reputation. That in the absence of proof to the contrary, or express agreement,

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must be presumed to have been the result of joint skill, capital and industry, when built up by the parties themselves, or by a joint purchase, when it has been reared by a predecessor. As the acquisition was joint, the value must be shared.

Mr. Bell, in his commentaries, observes (vol. 2, p. 645) that the good will of a mercantile or literary establishment seems to form a part of the common stock.

He cites *Crawshay* agt. *Collins* (15 *Vesey R.*, 227), *Curtwall* agt, *Lye* (17 *Vesey R.*, 335), *McCormick* agt. *McCubben* (4 *July*, 1822, 1 *Shaw & Ballantine R.*, 540.)

Lord ELDON concurred in Sir SAMUEL ROMILLY's doubt as to the decision in *Hammond* agt. *Douglass*, and that is equivalent to an express overruling it. It was Lord ELDON's manner of doing so.

In the late case of *McDonald* agt. *Richardson* (1 *Geffard's R.*, 81), before Vice-Chancellor STUART, this point seems to be taken for granted. A surviving partner had carried on the same business for some time after the death of his associate, and was called upon in the suit to account. The chief clerk was directed to ascertain the value of the testator's share of the good will of the partnership business, among other things. The survivor was also executor, but it is plain this could not be the ground of a charge.

Chissum agt. *Dewes* (5 *Russell R.*, 29) settled that the mortgagee of a lease, under which the business was carried on, was entitled to receive the avails of the sale of lease and good will. The latter constituted the chief part of the value.

The good will of a trade, says PINDAL, Ch. J., in *Hitchcock* agt. *Cohen* (6 *Adolph. & Ellis*, 438, 446), "is a subject of value and price. It may be sold, bequeathed, or become assets in the hands of the personal representative of a trader. If the restriction as to time is held to be illegal, because extended beyond the period of the party carrying on the trade himself, the value of such good will,

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considered in these various points of view, is altogether destroyed."

In *Elves* agt. *Crofts* (10 *Common Bench Rep.*, 241), (1 *J. Scott*), a butcher assigned for the residue of his term, premises in which he had carried on business, together with the fixtures and *good will* of the trade. He covenanted that he would not at any time thereafter, either by himself, or as agent or journeyman for another, set up or be employed in the trade or business of a butcher, within five miles from the premises assigned. It was held not an unreasonable restraint in respect either of time or distance, and that the covenant did not cease on the expiration of the term, or on the covenantee's ceasing, by himself or his assigns, to carry on the business assigned.

The court referred to *Hitchcock* agt. *Cohen* (*ut supra*), as decided in the exchequer chamber, and as settling that a restriction, reasonably limited as to space, but enduring for the life of the party restrained, was valid, as the only effectual mode of securing to the covenantee the full benefit of the *good will* of his trade. "Cases may be conceived in which, notwithstanding the facts found by the jury, that the covenantee had ceased, either on the premises or elsewhere, or by any assignee or licensee, to carry on the business, the *good will* assigned might not be at once extinguished; and if consideration of time or degree be permitted to affect the right to enforce such a covenant, its value would be diminished, and the saleable quality of the *good will*, which, according to all the recent authorities, is deserving protection, would be affected."

It seems also to be well settled, that when a partnership is dissolved, and there is no express stipulation upon the subject, the remaining partners are not under any obligation to refrain from setting up the same trade or business, and forming a new establishment for carrying on the same after the sale of the late business. The master of the rolls stated this rule in *Davies* agt. *Hodgson* (25 *Beaven's R.*,

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177), referring to *Cook* agt. *Collingridge*, as reported by *Mr. Collyer*, § 322.

The first decree in that case is found in *Jacobs' Report*, 623, and *Mr. Collyer* gives the directions of Lord *ELDON*, drawn by himself upon a petition for further carrying out the decree.

These points may be deduced from the minute provisions of this decree.

A partnership having terminated by lapse of time, there was nothing to prevent some of the members forming a new establishment to carry on the same business. That the good will, treated as the value of the chance of customers continuing to deal, could not be estimated upon the same principles as when a retiring partner sold his whole interest to continuing partners, and retired from the trade altogether. A buyer of the premises, the leasehold, shop, &c., would purchase something which could not be treated as of no speculative value, or not to be regarded in the sale. He would get the chance of retaining the old customers, getting them to come to the old place; but this chance, and therefore the value would be materially affected by the probability of the customers following the former members to their new establishment.

Nothing is found in this case as to the former name, by continuing partners in any form, whether modified or not.

In *Lewis* agt. *Langdon* (7 *Simon's R.*, 421), before noticed, Stephen Brookman and Joshua Langdon carried on business under the firm of Brookman & Langdon. Brookman died, and then Langdon died, the latter appointing William Langdon his executor and residuary legatee. He died, and administration was granted to Fruzan Langdon, his widow. The business was carried on at the same place, and under the same firm name, by Joshua Langdon, William Langdon, and Fruzan Langdon in succession; Fruzan Langdon took the plaintiff (*Lewis*) into partnership. Fruzan Lang-

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don then died, having appointed Augustus Langdon and two others her executors. James Lewis then took the plaintiff (Warren) into partnership, and they carried on the business at a different place from the original location, under the firm of James Lewis & Co., successors to Brookman & Langdon. The bill was to restrain them from using that name in the business. There was no agreement in the case, which does not seem to me of much importance on the main question.

The vice-chancellor said: "I cannot but think, when two partners carry on a business together, under a given name, that during the partnership it is the joint right of them both to carry on the business under that name, and that upon the death of one of them, the right which they before had jointly, becomes the separate right of the survivor."

It is to be observed, upon this case, that the defendant had not a shadow of right to the use of the firm name. The plaintiff had the right, so far as any existed in Joshua Langdon, as survivor of Brookman & Langdon. Had a representative of Brookman been defendant, the question would have distinctly arisen.

In *Clinton and others agt. Douglass* (1 H. R. V. Johnson's R., 178), before Vice-Chancellor Wood, 1859, the business had been carried on for some time under the firm name of John Douglass & Co. By a written instrument, the defendant sold to the plaintiff "all his shares, rights and interests in the trade or business carried on by him and the plaintiffs at Bradford, in copartnership, and under the firm name of John Douglass & Co., and the good will thereof," other and comprehensive words were used to transfer the whole of the partnership goods and property, and the assignors' title therein. The defendant also leased to the plaintiff, for seven years, the premises at which the business had been carried on.

Notice of the dissolution of the old firm was given, and

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the style of the new firm was Clinton, Bankhart & Huet (late John Douglass & Co.).

The location of the old business was at Hall Jugs, Bradford. The defendant subsequently opened a store for the same business, next door to that of the plaintiff, leased by him, and placarded it with the name of John Douglass & Company. An injunction was granted, restraining the defendant until the hearing of the cause, "from resuming or carrying on the business of stuff merchant, at or about the immediate neighborhood of Bradford, either alone or in partnership with any other person, under the style or firm of John Douglass & Company, or in any other manner holding out that he is carrying on the business of stuff merchant, in continuation of or in succession to the business carried on by the late firm of John Douglass & Company."

The vice-chancellor enters into a very elaborate argument in the case. He holds expressly that the authorities are conclusive to the point, that the sale of the good will of a business without more, does not imply a contract on the part of the vendor not to set up a similar business himself. Upon a sale of the good will, the vendor is not precluded from carrying on a precisely similar business, with all the advantages from his own labor and industry, and from the regard people may have for him; and that, in a place next door, for example, to the very place where his former business was carried on.

But he also held that the name of a firm, that style under which its business has been carried on, is part of the good will, and passes with a sale. "The name of a firm is a very important part of the good will of the business carried on by the firm. A person says, I have always bought good articles at such a place of business; I know it by that name, and I send to the house of business identified by that name for that purpose. That the name is an important part of the good will of a business is obvious,

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when we consider that there are at this moment large banking houses, and brewing firms and others in this metropolis, which do not contain a single member of the individual name exposed in the firm."

The defendant "parted with the right to the plaintiff of representing themselves to be carrying on the identical business which had been carried on by the firm of John Douglass & Company. But they did not get the right to call themselves by that name *simpliciter*. This they had not claimed, but only to use the words "late John Douglass & Co.," in other words, the right to identify their house of business, formerly carried on by *John Douglass & Company*. That name had become well known. The business was identified by that name. It is not as if he were calling himself *John Douglass* alone, and carrying on a similar business under that name."

The judgment in *Cantwell agt. Lye* (17 *Vesey R.*, 346), distinctly admits that although you may set up a similar business, you are not entitled, when you have sold the good will of the business, to represent that you are continuing the *identical* business; not to say that you are the owner of that which you have sold. The defendant has not contracted against setting up business in opposition to the business sold by him to the plaintiff, but he must set it up fairly and distinctly as a separate business, and not as the old established business which he has sold.

I have quoted largely from this case, as none other that I am aware of has entered so fully into the subject.

In *Cantwell agt. Lye*, referred to (17 *Vesey R.*, 246), Lord ELDON said: "The question is whether, upon a fair understanding or representation, agreeably to the fact, this person is carrying on the plaintiff's trade, and in this view of the case I refer to *Hogg agt. Kirby* (8 *Vesey R.*, 215), where the defendant had a clear right to publish a similar work, under the same title, as the plaintiffs; represented as distinct and original, but was prevented from publish-

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ing his book as the work of the plaintiff, which had been partly published. So there can be no doubt that this court would interpose against that sort of fraud which is attempted by setting up the same trade, in the same place, under the same sign or name, the party giving himself out as the same person."

The law of France in relation at least to commercial partnerships, is very explicit upon this subject. The 21st article of the *Code of Commerce* is: "The name of the associates can alone constitute the firm name (*la raison sociale*). This is intended to forbid persons who succeed to the business of a deceased merchant from continuing it under his name. Credit is altogether personal. It does not transmit itself by cession or inheritance. It is won by actions and capacity. It is not right, then, that a successor should avail himself of a fallacious credit in appropriating a firm's name, extinguished by the death of one of those who gave it the value. (*Troplong le Droit Civil*, tome 12, n. 372; *Loi Sur L'Article 21 of the Code of Commerce.*)

M. Troplong adds: "One is astonished that such a contrary practice prevailed formerly in France, and exists in England. It is a source of fraud upon a confiding public. The retirement or decease of one of the associates effaces the firm's name. Another must be created."

Thus does the case stand upon all the authorities that I have found bearing upon it; and it would leave it without any direct authority, or even dictum in favor of the defendant, except that late and important one before Vice-Chancellor Wood.

But it is to be noticed that by a statute of our state, entitled "An act to prevent persons from transacting business under fictitious names," passed April 29th, 1833, (*Session Laws, ch. 281*), it is enacted that "No person shall hereafter transact business in the name of a partner (quere person) not interested in his firm," and where the

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designation 'and company,' or 'Co.,' is used, it shall represent an actual partner or partners." By section 2, the violation of this provision is made a misdemeanor.

By a statute, passed April the 17th, 1854 (*Session Laws, ch. 400*), a copartnership name may be continued by some, or any of the copartners, their assignees or appointees, provided a certificate, as prescribed by the act, is filed in the county clerk's office, and published as directed. But by section 4, the provisions are only to apply to firms having business relations with foreign countries. A bill to extend this provision is now before the legislature.

It seems to me that the principle and object of this statute extends to such a case as the one before us. It recognizes the principle as one of public policy, that the business must be transacted under the name of the actual parties doing it, and not under other names. It applies to persons in existence, as well as when a partner has retired or is dead. It accords with the French laws, and involves or warrants the proposition that the naked sale of the good will of a business does not transfer a right to the use of the vendor's name of trade.

We do not think that there is anything in Howe's inaction, or the employment of the term of Howe's Bakery, in the instrument of the 28th day of April, 1858, which can entitle the defendants to use the name.

MONCRIEF, Justice (dissenting).—Whether or not the term "good will," under all circumstances, includes the name under which the business originated or was continued, or became a thing of specific value, is not in the present instance necessary to determine.

A person not a lawyer would not imagine that when the "good will" and trade of a retail shop were sold, the vendor might the next day set up a shop within a few doors, and draw off all the customers. The "good will" of such a shop, in good faith and understanding, must

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mean all the benefit of the trade, and not merely a benefit of which the vendor might the next day deprive the vendee. This was the language used by the vice-chancellor, in 2 *Madd. Ch. R.*, 188, 219, in which the decision of Lord ELDON (17 *Vesey R.*, 346) was cited, and in reply to the proposition there laid down, "that good will was the probability that the old customers will resort to the old place."

(This clearly will not be applicable to the present case, as the transfer of the lease, without the additional provision in the agreement for the sale of the good will, fully and practically secured the old stand, with whatever probabilities were incident to it.)

Story defines "good will" to be the advantage or benefit acquired by an establishment beyond the mere capital or value of its stock, in consequence of the general public patronage and encouragement which it receives from constant or habitual customers, on account of its local position or common celebrity, or reputation for skill and affluence, or punctuality, or from the accidental circumstances or necessities, or even from ancient partialities or prejudices.

Courts of equity are frequently called upon to interpose and prevent a person from using the name of another in a business or concern, for the fraudulent purpose of imposing on the public, and supplanting the other in the *good will* of his concern. (3 *Kent*, 5th ed., 64, note; 2 *Kern. R.*, 813; 6 *Beavan R.*, 72; 8 *Paige R.*, 75; 4 *Paige R.*, 479; 2 *Barb. Ch. R.*, 101; 2 *Sand. Ch. R.*, 617; *affirming Taylor agt. Carpenter, per SPENCER, Senator.*)

The plaintiff adopted, appropriated, and used the words or name "Howe's Bakery," and by that name his establishment became known, and was extensively patronized, and was a thing having specific value. The plaintiff so avers in his complaint.

If the plaintiff, previous to the transfer, in 1852, to

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Baker, the assignor of the defendant, had sought the aid of equity to restrain a person, of the same surname, engaged in the same business in the city of New York, from using the words "Howe's Bakery," the claim would have rested not upon any exclusive right of the plaintiff to appropriate and monopolize these words, the one being peculiar to neither, and truthful as to both, and the other a generic term not capable of appropriation, but that the words had been long used by him, and had become known as indicating articles manufactured or made at, or vended from his establishment or place of business. The ground of interposition is, that a name having been taken for the purpose of distinguishing property, the defendant is not permitted, on the false representation that articles, really the defendant's, belong to or were made or sold under the management of the plaintiff, or came from his place of business, thereby depriving the plaintiff of the fair profit of his business.

The name or words "Howe's Bakery," was nothing but a trade mark, and as such is now sought to be protected by the plaintiff.

The name or trade mark passed by the assignment and transfer of the "good will," and if it was not the thing itself it was an integral part of it.

The contract of the parties leaves no room for conjecture as to their intention.

The stock in trade, fixtures, &c., were specifically mentioned; the leases were distinctly set forth; the art and mystery of the business was provided for by an express covenant, to teach whomsoever the vendee might select, and lastly, not least, after agreeing for the sale of the "good will," it was stipulated that the vendor (plaintiff) should not, directly or indirectly, engage or be concerned in the same business in the city of New York, without the consent of the vendee (Baker).

Again, this clear understanding of the parties, and of

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this construction of their agreement, is definitely fixed by the long acquiescence of the vendor, and of his requesting and obtaining leave to commence the business at a particular place, and use the name within those bounds.

It seems to me the statute has no application to the case under consideration ; the title clearly indicates the intent to prevent mischief by the use of a fraudulent, because entirely fictitious designation, the word "Co.," with no physical existence to represent it.

The name "Howe" had a living physical existence to support it. It was not therefore fictitious.

The name "Howe" required nothing to sustain it. As a trade mark, it is immaterial whether it was the name of animate or inanimate creation, or the purest effort of fancy on the part of its originator, possibly the more original in its character, the better would be the protection offered to it, the nearer it approach to the right to be patented. The plaintiff cannot avail himself of the statute, even if it did apply. Having agreed to dispose, and actually conveying the thing alleged to be prohibited, it does not lie with him to complain of his own violation of law, or a fraudulent representation to his vendee.

No such point was taken by the plaintiff upon the argument of the appeal.

The plaintiff might dispose of his credit. That is nothing more than a reputable name or character, and its influence.

The injunction should have been refused, and the complaint dismissed. The judgment of the special term should be reversed, &c.

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SUPREME COURT.

RUFUS PARK agt. ELLIAH CASTLE.

A tenancy from year to year is, under the provision of the Revised Statutes, for the summary dispossess of tenants, a tenancy for one or more years.

Therefore, a tenant from year to year may, after the expiration of his term, that is, at the expiration of each year he holds over the original term, be proceeded against in a summary manner for his removal from the premises, without any notice to quit.

There is no such estate as a tenancy "at will from year to year;" its assertion is a solecism. (*The case of Prouty agt. Prouty*, 5 How. Pr. R., 81; and *Wright agt. Mosher*, 16 id., 454.—*County court decisions*, non-concurred in on this question.)

Whether a tenant, from year to year, must now have six months' notice to quit, to authorise the landlord to turn him out of possession by action. *Quere?*

It seems, that six months' notice to quit may be necessary to authorise the removal of a tenant, from year to year, by summary proceedings, where there is a valid lease in writing for the term of one year, and thereafter, until one or the other party elects to terminate it.

Broome Special Term, February, 1860.

THIS was a summary proceeding to remove the defendant from the possession of a farm, in the town of Binghamton, as tenant of the plaintiff. It was commenced before a justice of the peace, under the act of 1849. (*Laws of 1849*, p. 291.) The case made by the plaintiff before the justice was, that he leased the farm by parol, without writing, to the defendant, for one year, commencing on the first day of April, 1857; that the defendant occupied the farm under this lease until the first day of April, 1858, and that then he continued to occupy the farm for another year, by permission of the plaintiff, but without any agreement being made in respect thereof; that on the 26th day of February, 1859, the plaintiff served a notice in writing on the defendant, requiring him to surrender, by the first day of April then next, the possession of the farm; and that the holding by the defendant after the first day of April, 1859, was without the permission of the plaintiff.

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On the second day of April, 1859, the justice issued his summons to the defendant, which was served; and the defendant appeared before the justice and filed an affidavit, and the issue thus formed was tried by a jury. The defendant insisted, before the justice, that the plaintiff's evidence showed the defendant was a tenant from year to year, and that he was entitled to six months' notice to quit. The justice held otherwise, and the defendant excepted. The jury rendered a verdict in favor of the plaintiff, on which the justice gave the usual judgment against the defendant. The defendant appealed to the Broome county court. The county judge was incapable of acting in the cause, and the county court transferred the case to the supreme court, pursuant to subdivision eleven of section thirty of the Code. The case was argued at a special term, held in Broome county, before Justice BALCOM, in February, 1860.

H. S. GRISWOLD, *for plaintiff.*

LEWIS SEYMOUR, *for defendant.*

BALCOM, Justice. There can be no doubt but that the defendant, by holding over after the expiration of the year for which he hired the farm, without any new agreement, but by permission of the plaintiff, became a tenant from year to year. The authorities agree in regard to this proposition. (*See 4 Kent's Com., 9th ed., 124-131.*) I cannot hold that the defendant was a tenant *at will from year to year*, although the Ontario and Saratoga county judges have decided that a person in a like situation is such a tenant. (*Prouty agt. Prouty, 5 How. Pr. R., 81; Wright agt. Mosher, 16 id., 454.*) The distinction between a tenancy *at will*, and one from year to year, is as well defined as that between one for life and one for years. There is no such estate as one "at will from year to year." The assertion that there is such a tenancy as one "at will

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from year to year," is a solecism. When actions of ejectment would lie against tenants at will, without notice to quit, courts construed tenancies at will to be tenancies from year to year, in order that tenants should not be subject to such actions without notice. (See *7 Johns. R.*, 1; *4 Cowen*, 349; *8 id.*, 13, 226; *4 Wend.*, 327; *11 id.*, 617.) But a tenant from year to year, was never construed to be a tenant at will until it was done in the two cases above cited.

An act was passed in 1820, which provided for the removal, summarily, of any tenant at will, or at sufferance, or for part of a year, or one or more years, or from year to year, who should, "after the expiration of his, her, or their term," hold over and continue in possession of demised premises, without the permission of the landlord; and no notice was required to be given to the tenant to authorize his removal, unless the tenancy was at will or sufferance. The case of *Nichols agt. Williams* (8 Cowen, 13) arose when this act was in force; and it was held therein that a tenant from year to year, "not being mentioned in the act as entitled to notice," might be turned out of possession without any.

By the Revised Statutes (2 R. S., 513, § 28) any tenant at will or at sufferance, or for any part of a year, or for one or more years, of houses or lands, may be removed summarily, where he shall hold over and continue in possession of the same *after the expiration of his term*, without the permission of the landlord; and no notice to remove therefrom is required, except where the holding is at will or by sufferance, and then one month's notice in writing must be given to the tenant. (1 R. S., 745, § 7.)

The defendant's counsel insists, that because the words "from year to year," which were in the act of 1820 (*Law of 1820*, p. 176) are omitted in the Revised Statutes, a tenant from year to year cannot be removed summarily, unless the landlord has given him six months' notice to

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quit. I think this position is untenable, for a tenant from year to year is clearly a tenant for one or more years; hence the words, "from year to year," would have been superfluous in the Revised Statutes; and the authors of those statutes seldom used any unnecessary words. Besides, if a tenancy from year to year is not to be regarded as a tenancy for one or more years, there is no authority whatever for removing a tenant from year to year by summary proceedings, for holding over after the expiration of his term, even though he has had a half year's notice to quit, or for removing him summarily for the nonpayment of rent; and he can only be turned out of possession *by action* for any cause. I do not think the authors of the Revised Statutes intended to exempt tenants from year to year, from being removed by summary proceedings, or that they have thus favored such tenants.

Now, as no notice to quit is required by the Revised Statutes to be given to a tenant, for one or more years, to authorize summary proceedings for his removal, none need be given him; and as a tenant from year to year is a tenant for one or more years, he may be proceeded against in a summary manner, for holding over after the expiration of his term, without six or one month's previous notice, as was held in *Nichols agt. Williams* (*supra*). That case is mentioned as good authority in Kent's Commentaries (see 4 *Kent's Com.*, 9th ed., 129, 130), and it was approved by Justice WILLARD, in *Post agt. Post* (14 *Barb.*, 255).

The court, in deciding *Nichols agt. Williams*, must have been of the opinion that the *term* of a tenant from year to year expires at the end of each year he holds over the original term, or they could not have held that he continued in possession *after the expiration of his term*, when his landlord omits to give him six months' notice to quit; and I think the term of a tenant, from year to year, should be regarded as ended, within the meaning of the Revised Statutes authorizing the summary removal of tenants, at

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the expiration of each year he holds over the original term. It is so, in fact, especially since no verbal contract for leasing is good for a longer period than one year. (2 R. S., 135, § 8.) And when a tenant for a year, or for one or more years, holds over after the expiration of his term, without any express agreement, but with the assent of his landlord, the law implies that he holds the premises upon the former terms for another year. (See 1 Denio, 113; Sherwood agt. Phillips, 13 Wend., 479; 8 Cowen, 226; 3 Hill, 547.) Hence he may be turned out of possession summarily, without any previous notice, at the end of any year he so holds over, because his term, that the law fixes for him, then expires, and he knows, without notice, that he cannot continue in possession longer, unless he has permission from his landlord. If the legislature had intended a tenant, from year to year, should have one month or a half year's notice to quit, to authorize his landlord to remove him summarily, I think they would have so declared; and as they have not said he must have such a notice, courts should not hold he is entitled to any. (8 Cowen, 13.)

If a tenant from year to year cannot be removed summarily at the end of any year, after the expiration of the original term, unless he has had six months' notice to quit, he has rights that are possessed by no other kind of tenants; and a tenancy from year to year is more difficult to terminate than it ought to be.

Whether a tenant from year to year must now have six months' notice to quit, to authorize the landlord to turn him out of possession *by action*, is a question not in the case.

I am not prepared to say that a half year's notice to quit is not necessary to authorize the removal of a tenant from year to year by summary proceedings, where there is a valid lease in writing for the term of one year, and thereafter, until one or the other party elects to terminate

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it (*see 1 Kern., 494*), or where there is a lease, under seal, for a year, and so from year to year as long as it should please both parties (*see 13 Wend., 482, and cases there cited*); because the parties themselves expressly agree in such cases for the continuance of the tenancy, until one or the other signifies his intention, by notice, to terminate it; and the law does not imply that it expires at the end of any year, without one of the parties has notified the other it should so terminate. But such is not this case, for the lease was not in writing, and the parties could not bind themselves by a mere verbal agreement, to continue it longer than one year, or after one year until one or the other should elect to terminate it. The law only implies that the lease was extended *one year* after the expiration of the original term agreed upon.

My conclusion is, that the defendant was not entitled to six months', or one month's notice, to remove from the farm, and that the plaintiff had the right, at the expiration of the second year, to turn him out of possession summarily, without giving him any notice to quit.

As the justice committed no error affecting the merits of the case prejudicial to the defendant, in admitting or rejecting evidence, his judgment should be affirmed, with costs.

SUPREME COURT.

ADRIAN MARSEILLES, Plaintiff in Error, agt. PATRICK BULGER, Defendant in Error.

Under section 399 of the Code, a *landlord* is not a competent witness for himself in "summary proceedings to recover the possession of land." (2 R. S., 512.) (How does the amendment or reduction of section 399, made in 1860, affect this question? R. E. P.)

NEW YORK PRACTICE REPORTS.



Marseilles agt. Balzer.

Special Term, January, 1860.

THIS was a *certiorari* to C. W. Van Voorhis, Esq., justice of the district court in the city of New York, for the 7th judicial district.

The facts were these: The defendant in error, as the plaintiff's landlord, instituted proceedings before the justice, under article 2, chapter 8, of the 3d part of the Revised Statutes, entitled "Summary proceedings to recover the possession of land in other cases," to remove the plaintiff in error, as his tenant, from certain premises in the city of New York, upon the ground of the nonpayment of rent. The tenant filed with the justice an affidavit denying the facts on which the proceedings had been instituted; the matter was tried before the justice, without a jury. On the trial the landlord offered himself as a witness in his own behalf; the tenant objected, that the landlord was not a competent witness for himself; that the law does not allow a party to be a witness in his own favor in a proceeding like this; the justice overruled the objection, and the tenant excepted; the landlord was sworn, and on his testimony the justice rendered judgment against the tenant, whereupon the tenant removed the case into this court by *certiorari*.

NELSON SMITH, for plaintiff in error.

I. The landlord, in summary proceedings to recover the possession of land (2 R. S., 512, 513), is not a competent witness in his own behalf, and the justice erred in admitting him.

The Code (§ 399), allowing any party to an action or proceeding, to be a witness in his own behalf, is contained in part second of that act; and by section 471 shall not affect any special statutory remedy not obtained by action. (*Benjamin agt. Benjamin*, 1 *Seld.* 383; *Hyatt agt. Burr*, 8 *How.*, 170.)

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II. Section 399, as originally passed, did not allow a party to be a witness in his own favor. It was amended to that effect (*Law of 1857*); but that amendment is to be taken as a part of the original act, as if they were one and the same act; and the first must be read as containing in itself, in words, the amendment supplied by the latter. (*Attorney-General agt. Paugett*, 2 Price, 381.) In such case the unrepealed provisions of the first statute necessarily limit and control the amendment.

JAMES C. HARS, for defendant in error.

LEONARD, Justice, gave judgment for the tenant, reversing the judgment of the justice, with costs.

UNITED STATES DISTRICT COURT.

WILLIAM C. TALBOT and others agt. WILLIAM W. WAKEMAN and others.

Where, on a trial at law, a fatal variance between the allegations and the proof would appear by including in the action an independent party, where no proof was furnished of his interest in the suit, yet such an irregularity in pleading will not work a defeat of the action in admiralty; and the insertion of such party may be disregarded.

and so where it is alleged that there is a want of proper parties, and the proof shows that such parties acted as agents or brokers, and had no interest in the suit, although they were named in the charter party upon which the action was brought with the libelants, there is no substantial variance.

Where the faulty and unsafe stowage of a cargo is made exclusively by the authority and direction of the master of the vessel, it creates a liability upon the owner, which would not be the case if the evidence showed that the shipper knew and acquiesced in the stowage.

New York, May, 1860.

This was a libel filed by William C. Talbot and others, "composing the firm of W. C. Talbot & Co., of San Fran-

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cisco, and the Puget Mill Company, of Puget Sound," against the defendants, as owners of brig *Eolian*, to recover damages by reason of an alleged violation of a charter for a voyage from San Francisco to Puget Sound, with a cargo of plank, square timber and spars; thence to China; and thence, with merchandise and passengers, back to San Francisco.

The libel alleged that the libelants chartered the vessel for the voyage through brokers, named Lubeck & Co., who had no interest in the charter; that by the charter it was agreed that the vessel should be tight, staunch, well fitted, &c., when she was in fact unseaworthy, and that by reason of that fact, and of the failure to stow the cargo properly, and of the throwing overboard of one part of the cargo, and the sale of another part, and other breaches of the charter party, the libelants were damaged to the amount of several thousand dollars.

The answer alleged that the vessel was seaworthy, but "in consequence of the perils of the sea and stress of weather a part of the cargo was thrown overboard, and another part sold from necessity, to make repairs, and enable the performance of the contract," and claimed damages by reason of an alleged breach of the charter in China by the libelants, to an amount exceeding the libelants' claim.

The respondent claimed, on the hearing, that there was a fatal variance between the allegations and proofs; that the charter proved was one under seal, chartering the vessel to W. C. Talbot & Co., and Lubeck & Co., while Lubeck & Co. were not made parties, and the Puget Mill Company were made libelants.

They further claimed that no damages could be claimed, by reason of lading spars on the deck of the vessel, as the nature of the articles necessarily imported that mode of carriage, and the libelants are therefore chargeable with

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the responsibility of it, as decided in *Lawrence agt. Min-tum* (17 How., 100).

BENEDICT, BURR and BENEDICT, for libelants.
BEERS, DEAN and DONOHUE, for respondents.

Held by the Court, BETTS, Justice. That although on trial at law, there would be a fatal variance, in that the Puget Mill Company would be deemed independent parties, and proof must be given of their interest, which proof is not furnished; yet this is but an irregularity in pleading, not working a defeat of an action in the admiralty, and the insertion of the Puget Mill Company may be disregarded.

That the evidence shows that Lubeck & Co. were only brokers, and not parties in interest.

That there is proof that the shipment of the spars was made exclusively by the authority and direction of the master of the vessel, while in the case cited from 17th How. R., there was evidence that the shipper knew and acquiesced in the stowage.

That on the evidence, the vessel was put on the voyage in an unseaworthy condition; that the stowage of the cargo on deck was made in a faulty and unsafe manner; that the proof is very spare and indefinite as to the necessity of a jettison or a sale of any of the cargo; and that the defendants fail to prove a fulfillment of their engagements to receive cargo and passengers in China, and transport them to San Francisco.

Decree; therefore, for libelants, with a reference to a commissioner to ascertain the items of damage.

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SUPREME COURT.

HUNGERFORD'S BANK agt. THE POTSDAM AND WATERTOWN RAILROAD COMPANY, EDWIN DODGE, WILLIS PHELPS, H. HOLCOMB and others.

The "act to prohibit corporations from interposing the defense of usury in any action," passed April 6, 1858, is as to the contract of the corporation, that the statute of usury is quasi repealed; but not as to the contract of individual indorsers or sureties for such corporation. They are not necessarily restricted by their relation to the principal, to the defenses which may be made available to the maker of a note.

Therefore, where the contract or promise of the corporation to pay, is clearly usurious in itself, and the corporation is, by this act, prohibited from interposing the defense of usury to an action thereon, the indorsers or sureties of the corporation, who are liable under a different contract from the principal, may interpose such defense.

Fifth District General Term, October, 1859.

Present, W. F. ALLEN, PRATT, BACON and MULLIN, Justices.

This action was brought on a promissory note made by the Potsdam and Watertown Railroad Company, indorsed by the other defendants, for \$5,000, payable in the city of New York. It was given to take up another note of the same amount, made and indorsed by the same parties, payable also in the city of New York, which had been protested, and which the plaintiff had been obliged to take up with New York funds. Plaintiff is located at Adams, Jefferson county, N. Y. When the note in suit was given, the defendant, the Potsdam and Watertown Railroad Company, paid to plaintiff the discount on it, and the exchange on the old note, being half of one per cent, that being the current rate of exchange between Adams and New York. The defense of usury was set up by the indorsers, and the case was tried at the Jefferson circuit, in December, 1858, before Hon. CHARLES MASON, when judgment was rendered for the plaintiff, for the full amount claimed against all the defendants.

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Mr. Justice MASON gave the following reasons for his judgment: This loan was made by the plaintiff to the defendant, the Potsdam and Watertown Railroad Company, and the other defendants were accommodation indorsers of the note. This note in suit was given upon an agreement made between the plaintiff and the railroad company, by which the plaintiff intended to get, and did get, more than seven per cent for the loan or forbearance of money. (*The Seneca County Bank agt. Schermerhorn*, 1 *Denio*, 133; *Bank of the United States agt. Davis*, 2 *Hill*, 457; 7 *Paige*, 559; 17 *Ves.*, 444; *Carr. & P.*, 101; 3 *Barn. & Cres.*, 276; 2 *Parsons on Contracts*, 384, 385, 390; 19 *John.*, 294.)

The contract, however, was a valid one, as between the plaintiff and the principal debtor, the Potsdam and Watertown Railroad Company; for the act of April 6, 1850 (*Session Laws*, p. 344), must be construed as a virtual repeal of the statutes of usury, as to all contracts made by such associations, stipulating to pay more than seven per cent interest. (*Curtis agt. Leavitt*, 15 *N. Y. R.*, 9; *Butterworth agt. O'Brien*, 16 *How. Pr. R.*, 503.) There would be no doubt that the defence of usury is made out in this case, were it not that this contract of loan was made to the defendant, the Potsdam and Watertown Railroad Company; as between that corporation and the plaintiff, the contract is valid, although there was an agreement to pay more than seven per cent for the loan or forbearance of money. The only remaining question is, whether these defendants, who are mere accommodation indorsers for this corporation, can set up this defence of usury.

The rule is a familiar one, that a contract can only be avoided for usury by the party who made it, or by some one standing in legal privity with him, and not by a stranger to the transaction. (*Dix agt. Van Wyck*, 2 *Hill*, 524; *Green agt. Morse*, 4 *Barb.*, 341.) These indorsers, although not actual recipients of the money loaned, or in the strictest sense, a party to the contract of loan, yet they are, as

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indorsers of this note, privies to the original contract, and liable upon it, equally with the principal who borrowed the money; and, as privies, they have a right to set up any defence which the principal could. But when the contract is valid between the principal debtor and lender, I do not think the accommodation indorsers can say the contract is illegal as to them.

These indorsers have made no contract of loan with the plaintiff; as indorsers, they are privies to the original contract of loan made by the defendant, the principal debtor. If I am right in this, then these indorsers are but nothing more than privies to a valid contract made by their principal, and of course cannot set up the defence of usury when their principal debtor could not. This result is inevitable, unless we hold that these accommodation indorsers are to be deemed borrowers from the plaintiff, and each to have an independent contract with the plaintiff, or unless we hold them actual parties to a contract of loan, neither of which can they strictly be regarded. In one sense they are parties to the original contract; that is, they are equally liable upon the note with the maker, and are parties to the note, but they have no defence which the maker has not. The plaintiff is entitled to recover against these indorsers, the amount of this note, which amounts, principal and interest, to the sum of five thousand four hundred and sixty-six dollars and sixty-six cents, and for which sum I order judgment for the plaintiff, with costs to be taxed. From this judgment an appeal was taken by the defendants to the general term.

H. L. KNOWLES, *for appellants.*

MERWIN & SPRATT, *for respondent.*

By the Court, W. F. ALLEN, Justice. The plaintiff loaned to the Potsdam and Watertown Railroad Company money at a greater rate of interest than that allowed by

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law, and to secure the repayment of the money so loaned, with the legal interest, the note in suit was given, the individual defendants indorsing as the sureties, and for the accommodation of the railroad company, the maker of the note. Judgment at the circuit was given against the indorsers, upon the ground that they were estopped by the "Act to prohibit corporations from interposing the defence of usury in any action," passed April 6, 1850, from alleging usury as a defence to this action.

The defendants are in no sense strangers to the contract of loan, so as to preclude them from setting up the defence of usury when sued upon their indorsement, or from seeking affirmative relief, by action, on the ground of usury. They are sureties of the borrower, and as such are embraced in the term "borrower," as used in the eighth section of the Revised Statutes, relating to usury, and in the fourth section of the usury law of 1837. (3 R. S., 5th ed., 73, §§ 8, 13, 74; *Post* agt. *Bank of Utica*, 7 *Hill*, 391; *Cole* agt. *Sanger*, 10 *Paige*, 583; *Morse* agt. *Hovey*, 9 *Paige*, 197.) A mere stranger to the transaction cannot ordinarily allege usury in respect to it; but a party to deed or contract, as well as those standing in legal privity with him, can, unless estopped or under disability of some kind, always show it to be void when it is sought to be enforced against him. The defendants are not certainly strangers to their own contract of indorsement. They, and they only, can allege the invalidity of their contract. (*Dix* agt. *Van Wyck*, 2 *Hill*, 522; *Green* agt. *Moore*, 4 *Barb.*, 332.) They are not necessarily restricted by their relation to the principal, to the defences which may be made available to the maker of the note.

They are not joint contractors with the maker, and the contracts of the maker and indorsers are entirely distinct, and governed by different rules. The contract of the one is conditional, while that of the other is absolute. An action against an indorser may be defeated by want of

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demand and notice, by dealing with the principal debtor to his prejudice, when he occupies the position of a surety; and an indorsement may be void, as obtained by fraud, or for some other reason, while the contract of the maker is valid. So, too, one party to a note (maker or indorser) may be estopped by his own acts from setting up a defence, true in fact and common to both, and which would be fatal, while the other parties may avail themselves of it. (*McKnight* agt. *Wheeler*, 6 *Hill*, 492; *Holmes* agt. *Williams*, 10 *Paige*, 326; 3 *Kern.*, 316; *per Denio, J.*; *Chamberlain* agt. *Townsend*, 26 *Barb.*, 611; *Dane* agt. *Schutt*, 2 *Duer* 621; *Clark* agt. *Sessions*, 4 *id.*, 408; *Prescott* agt. *Davis*, 4 *Barb.*, 495.)

As one party may be estopped by his own acts from setting up a defence, so he may be estopped by act and operation of law, or by a statute describing him by name, or by his status or condition, or as a contractor in a particular firm, without affecting the parties not named. The contracts of makers and indorsers of promissory notes are treated, as they are in truth, as separate and several contracts. They may or may not be supported by the same consideration, but a joint action will not lie against them, although they may now by statute be sued together; but in such case the action is regarded for all the purposes of protecting the rights of parties, and is prosecuted as a several action against the several parties. The validity of the contract of indorsement does not necessarily depend upon the validity of the engagement of the maker. It is true, where both grow out of the same transaction, and depend upon the same consideration, if one is illegal both are necessarily so; but it does not follow, that because one is not in a situation to allege the illegality, the other shall be precluded. The law which prohibits the borrower, in this case, to allege usury is very direct in its terms, and simple in its provisions. "No corporation shall hereafter interpose the defence of usury."

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Assignees and representatives of corporations, although not named, are within the spirit of the act, and therefore within its terms; and they are not permitted to avail themselves of a defence from which the corporations are excluded. (*Curtis agt. Leavitt*, 15 N. Y. R., 296.)

Whether, under all circumstances, creditors and others claiming under a corporation should be within the prohibition, is not settled, and is not free from doubt, but need not be considered here. So, too, although the letter of the act merely forbids corporations from interposing the defence of usury, it has been very properly held that it necessarily takes from the corporation the right to assert the usury in any way, defensively, and in any way to vacate or set aside a contract, as well by affirmative action as by way of defence to an action on the contract. It takes from the corporation the objection of usury. (*Butterworth agt. O'Brien*, 16 *How. Pr. R.*, 503; *s. c.*, 28 *Barb.*, 187.) This being so, the language used by the learned judge of the court of appeals, in *Curtis agt. Leavitt*, was appropriate and expressive. The undertaking of a corporation founded upon a usurious consideration is, *quoad* the corporation and its receiver or assignee, as if no statute of usury existed. A statute is as no statute to one who is prohibited to use or claim the benefit of it. It is as a repealed statute to him. His rights are not affected by it. Judge Comstock says (p. 85): "My impression is that the act must be construed as a repeal of the statutes of usury, as to all contracts of corporations stipulating to pay interest," &c.

This is doubtless true, but that does not extend necessarily to collateral contracts of others. Here we have the agreement for a loan usurious in itself, consummated by the borrower, and the absolute promise or contract of the corporation to pay, as to which it is said, and need not be decided, the statute of usury is repealed, and the collateral and conditional contract of the sureties, as to whom

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the statute of usury is in full force. Judge Brown (p. 154) better expresses my idea of the effect and operation of the statute, and refers to it as operating upon the condition of the artificial beings named, and thus, as to their incidentally affecting the contract, he says: "The condition of this class of beings becomes the same as if the usury laws never existed." The statute operates directly upon the person, and only indirectly and incidentally upon the contract. Construction has no place in respect to a statute or other instrument which is perfectly plain and easy to be understood, giving the words their ordinary and usual signification. The statute was passed under the pressure of the case of the *Dry Dock Bank* agt. *The American Life Insurance and Trust Company*, in which the plaintiff was exempted from the payment of a very large sum of money, loaned under a contract held to be usurious (3 *Comst.*, 344), and was not designed especially to give moneyed corporations the advantage over needy individuals, competing for loans in the money market.

It may have had that effect, but such was not its primary object; which was to hold corporations to their engagements, irrespective of the general policy of the usury laws, as affecting the contracts of individuals. The language chosen is well calculated to carry out the primary object of the act, and is not so general as to interfere with the usury laws, or to affect individuals. If the statute of 1850, by implication, repeals the usury laws, so far as contracts for loans to corporations are concerned, as is claimed, then a repeal of that act would not so restore the usury laws as to invalidate contracts made during its existence, by bringing them within the penalty imposed by the usury laws. A repeal of the act could not affect the contract, and yet my impression is, that a repeal of that act would place all contracts of corporations on the same footing with contracts made by individuals. The statute would preclude a corporation surety from interpo-

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sing the defence of usury. Although the individual and principal debtor, not within the act, would not be estopped. It certainly cannot be claimed that all parties to a promissory note or bill of exchange, in which the name of a corporation is found as maker, drawer, indorser, or acceptor, are by the act of 1850 debarred from the protection of the statutes of usury.

It is supposed that there is some mysterious connection between the contracts of the maker and indorsers, by means of the loan, which constitutes the consideration of both, by which the disabilities of the maker are transferred to the indorsers. But I am unable to see by what process. If the legislature had said, as they might, that the statutes of usury should not apply to contracts for the loan or forbearance of money to corporations, the case would be different, and the plaintiff's counsel would be right, but it is not so written, and we are not permitted to go beyond the statute. If such had been the substance of the act, then it would not have affected the liability of corporations upon contracts made in other states, and void by the usury laws of those states. Our statutes could not repeal foreign statutes, and they could have been pleaded in our courts.

But the statute does, in truth, as intended, said Judge Comstock, in *Curtis agt. Leavitt*, prohibit corporations from interposing in our courts the usury laws of other states and countries as a defence to their contracts, which shows that the statute operates not by way of a repeal of our statutes of usury, but simply upon the ground that the prohibition is personal. I do not suppose that it would make any difference if the action was against the defendants as joint borrowers with the railroad corporation, and upon a joint contract. But it is not so, and the contracts are as independent as if written on separate pieces of paper. Suppose the defendants had loaned their note to the railroad company, payable to bearer, and the company

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without indorsement had sold it for less than its face, so that it would have been void for usury, would the fact that the loan was made to a corporation, bring the parties to the note within the provisions of the act of 1850, and exclude them from the benefit of the usury laws?

Certainly not, as I think; and if not, then the fact that the corporation indorsed the note would not affect the makers; and to go one step further, the fact that the corporation borrowed the indorsement rather than the note of the individuals, would not vary the rights of the parties. The statute is (3 R. S., 5th ed., 73, § 5): "All bonds, bills, notes, assurances, conveyances, all other contracts and securities whatsoever, &c., whereupon and whereby there shall be reserved or taken a greater sum or value for the loan or forbearance of money, &c., than is prescribed by statute, shall be void." An indorsement by way of security is within the provision.

The note and indorsement received vitality by the transfer to secure the loan, and depend upon it for a consideration; and if that is illegal the contract fails. It is no answer to the plea of usury, when interposed by the indorser, to say that the maker is estopped, or by law precluded from alleging the defence. When the maker interposes the defence the estoppel may be replied.

It is as to the contract of the corporation that the statute of usury is *quasi* repealed, not as to the individual indorser. It is only by a construction not warranted by the language of the act, nor required by any necessity, nor necessary to give full effect to the statute and the intent of the legislature, as expressed in it, that it can be claimed that the loan to a corporation, and all securities connected with it, are made valid by being taken out of the operation of the statutes of usury by the act of 1850, and I am not prepared to go that length.

We are cited to two cases, *Bork agt. Seaman* (24 Penn. R., 485), and *The Market Bank of Troy agt. Smith*, decided

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by the United States district court for Wisconsin, and reported in the *American Law Register* for September, 1859, in which the same construction was given to the statute, and with the reasoning I am entirely satisfied. Perhaps a shorter answer to the defence interposed in those states, would have been that the laws of this state affecting the remedy had no extra territorial force, and such would have been consistent with the view taken of the statute.

I think the learned justice erred in his application of the statute at the circuit, and that the judgment must be reversed, and a new trial granted, costs to abide the event.

SUPREME COURT.

JOHN C. ANGELL, receiver, &c., agt. JOHN SILBURY and others.

"Whenever a judgment at law, or a decree in equity, shall be obtained against any corporation, incorporated under the laws of this state, and an execution issued thereon shall have been returned unsatisfied, in part or in whole, upon the petition of the person obtaining such judgment or decree, or his representatives, the supreme court may sequester the stock, property, things in action, and effects of such corporation, and may appoint a receiver of the same." (2 R. S., p. 468, § 36.)

Held, that the power of the receiver, under this section, is not confined merely to the payment of the plaintiff's judgment; but he is authorized to proceed and act for all the creditors.

In the case of ~~moneyed~~ corporations, when insolvent, this act, in the subsequent sections, provides for their being wound up, and their dissolution, while such proceedings against other corporations do not necessarily lead to such a result.

The court have the power, and in such a case as this its exercise is proper, on payment of the plaintiff's claim and costs, in the absence of any evidence to show that any other creditor has sought to avail himself of the benefits of this action, to order it to be discontinued, and the receiver to be discharged.

New York Special Term, October, 1859.

The defendant moves to dissolve an injunction granted

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in favor of the plaintiff, who was appointed receiver of the American Timber Bending Company, upon the return of an execution against the company unsatisfied, by virtue of the provisions of 2 Revised Statutes, p. 463, § 36.

The injunction restrains the defendants, other than the insolvent corporation, from disposing of any property which belongs to that corporation, and was assigned to the defendants, or any of them, after its insolvency was ascertained.

INGRAHAM, Justice. The first objection is, as to the power of the receiver, and whether he acts as receiver, merely to pay the plaintiff's judgment, or as a receiver for all the creditors.

This question appears to have been examined in several cases cited on the argument, some of which were moneyed corporations, and subject to different provisions from others; but the opinions expressed in these cases do not appear to be confined exclusively to that class.

In *Bangs* agt. *McIntosh* (23 Barb., p. 591), Mr. Justice SMITH says: "The remedy, under section 36, is summary and of serious consequences. * * * * It is not like a creditor's bill, a proceeding in behalf of the creditor, instituting the proceeding, for he obtains no preference, and is only to be paid rateably with the other creditors; and in *Mann* agt. *Peatz* (3 Seld., 415), Mr. Justice PRATT, referring to the same section, says the object of the legislature, by the 36th and 37th sections, was simply to provide a summary mode for the payment of *all* its debts, * * * * and again, "The statute provides for an equal distribution of the property among all the creditors, instead of applying it to the payment of the particular creditor whose execution has been returned unsatisfied." The distinction there drawn between moneyed corporations and others, is that in the case of moneyed corporations, when insolvent, the subsequent sections provide for

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their being wound up, and their dissolution, while such proceedings against other corporations would not necessarily lead to such a result.

In addition to these decisions, the legislature, by the statutes passed in 1852 (ch. 71), provided that receivers appointed under section 36 should be authorized to proceed against directors and others who should improperly dispose of or misapply the property of the corporation.

It is also objected to this injunction against these defendants, that the sale to them was a fair one, within the powers of the company, and being completed ought not to be enjoined. I am not led to adopt such a conclusion from the affidavits in this case. On the contrary, I am inclined to think the transaction may come within some of the provisions contained in this statute, which makes the property liable to the creditors.

I am not satisfied that any good reason exists for dissolving the injunction upon the merits.

As to the objection that the receiver has not given sufficient security to take possession of all the property of the company, it is enough to say that such possession of this property is not sought at the present time. The parties interested may at any time apply to the court to have the security increased if necessary.

But while I am of the opinion that the injunction should not be dissolved on this motion, I by no means agree with the plaintiff's counsel that the proceedings may not be discontinued; on the contrary, the court may, on payment of the plaintiff's claim and costs, in the absence of any evidence to show that any other creditor has sought to avail himself of the benefits of this action, order the action to be discontinued and the receiver to be discharged. Although by the proceedings in the action, the plaintiff obtains no priority over other creditors, yet if a voluntary payment is made, there is no ground for further proceeding against the company. The distribution among all the

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creditors is only to be upon a final decree in the action (§ 37), and if no final decree is made in consequence of the discontinuance of the action, the provision is inoperative.

The motion to dissolve the injunction is denied, with \$10 costs, unless the defendants pay the plaintiff's claim and the costs of this action, in which case the same is granted.

SUPREME COURT.**THE BRIDGEPORT CITY BANK agt. THE EMPIRE STONE DRESSING COMPANY.**

A corporation cannot become accommodation indorsers or sureties in any other form. (See 3 Kern. 309.)

If, however, such an indorsement is made by a corporation, and the note has been discounted in good faith, in consequence of representations made by its proper officers, that it was their own note; or if the note has passed into the hands of a bona fide holder without notice, who has paid a valuable consideration for it, the security will be held valid so as to protect the holder. Where there is conflicting evidence on these points, it is a proper case to be left to the jury.

New York General Term, October, 1859.

APPEAL from a judgment at special term, entered on a verdict for plaintiffs. The facts will appear in the opinion.

By the court, **CLEAKE**, Justice. Whether a corporation can become sureties, either as accommodation indorsers, or in any other form, we supposed was beyond all question, firmly established in the negative. We had occasion to discuss and decide this question, little more than a year ago, at the general term of this district. The decision is reported in the *26th Barbour*, 568, in the case of *Morford agt. The Farmers' Bank of Saratoga*. It is expressly stated in the opinion in that case, that a banking or other corpo-

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ration is not authorized to make an accommodation indorsement; and it is not binding unless it appears that the note has been discounted in good faith by the party suing on it, in consequence of a representation made by the bank that it was its own note. This, in fact, was only a reiteration of the opinion of the court of appeals, in the *Bank of Genesee* agt. *The Patchin Bank* (3 Kern., 309). The language of the court in that opinion is: "It is quite clear that the officers of a banking association or other corporation, have no power to engage the institution as the surety of another. Such a transaction is without the scope of the business of the company." And again: "But if the proper officers of the defendant have negotiated it to the plaintiff, representing it to be a bill belonging to their bank, and upon the faith of that representation the plaintiff has, in the usual course of its business, discounted it, advancing to the defendant the proceeds, the defendant is precluded upon the principle first referred to (the principle of estoppel), from setting up that it was indorsed without authority." The principle, indeed, is also recognized in that opinion, that a negotiable security of a corporation, which, upon its face appears to have been duly issued by the corporation, is valid in the hands of a *dona fide* holder without notice, although, in fact, it was issued for a purpose, and at a place, not authorized by the charter.

The decision of the court of appeals, in *The Farmers' and Mechanics' Bank* agt. *The Butchers' and Drovers' Bank* (16 N. Y. R., 125), is not in conflict with these principles, but, on the contrary, is in complete accordance with them. The real question in that case was, whether the principal is estopped by the representation of the agent from disputing facts, which show that the act was not authorized. In that case the defendants' teller had certified that the drawer of a check had funds in their bank to pay the check. While it was admitted that a principal is not

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bound by an authorized act of the agent, it was held, that although the teller had no authority to certify without funds, there was a plain distinction between the terms of a power and facts entirely extraneous, upon which the right to exercise the authority conferred may depend. "One who deals with an agent has no right to confide in the representations of the agent as to the extent of his powers. If, therefore, a person knowing that the bank has no funds of the drawer, should take a certified check upon the representation of the cashier or other officers by whom the certificate was made, that he was authorized to certify without funds, the bank would not be liable." But in regard to the extrinsic fact, whether the bank had funds or not, it was held that the bank was estopped from denying the representations of its agent. The teller, *by certifying the check*, virtually declared the extrinsic fact, that the drawer had funds in the bank, and it was held that the bank was estopped from disputing this declaration. It is expressly held in that case, however, that if the holders of the check knew that the representations of the teller were false, they would not be deemed innocent holders; much less does it contradict the principle that a corporation cannot become surety, either as an accommodation indorser or in any other form, unless the note has been discounted in good faith, in consequence of representations made by its proper officers, that it was their own note, or unless it (the note of the corporation) has passed into the hands of a *bona fide* holder without notice, who has paid valuable consideration for it.

In the case under consideration, the main question, besides that relating to the notice of protest arising from the principle to which I have referred, was whether the indorsement on the note in suit was for the accommodation of a third party, or whether it was discounted by the plaintiffs for the benefit of the defendants; and secondly, if really an accommodation indorsement, was it discounted

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by the plaintiffs in consequence of representations made by the proper officers of the defendants, that it was their own note, received by them in the ordinary course of business. There was conflicting evidence on these points, but the judge left nothing for the jury to decide, he himself deciding that the plaintiffs discounted the note, so as to become the *bona fide* holder, and directed the jury to find a verdict for the plaintiffs. This, without any consideration of the other points presented on the argument, is sufficient to induce us to set aside the verdict, and to order a new trial, costs to abide the event.

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NEW YORK SUPERIOR COURT.

BENAJAH LEFFINGWELL, receiver, &c., agt. WILLIAM G. CHAVE, and wife.

On serving an *injunction*, it is sufficient to serve with the order, the *complaint* and *verification* upon which alone it was granted.

An injunction order cannot become operative until the *summons* in the action has been served; and the service of an injunction upon the defendant prior to the service of the summons is *irregular*. But the injunction order may be *signed* by the justice preparatory to such service, and be *delivered* to be served with the *summons*.

It is not necessary that the *undertaking* given on the granting of an injunction should be *signed by the plaintiff*.

The 222d section of the Code, requires a written undertaking "on the part of the plaintiff, with or without *sureties*," &c. An approved undertaking, executed by any persons of competent ability, agreeing that the plaintiff shall pay to the defendant the damages which he may sustain, &c., if it be procured and furnished by the plaintiff or his attorney, is an *undertaking on the part of the plaintiff*, within the meaning of the section.

The terms, "with or without *sureties*," seem to indicate that whoever gives the absolute undertaking, whether it be the plaintiff himself, or some persons whom he or his attorney may procure, there still may be *sureties* if the judge so require; and those who sign as *sureties* may so express their obligation if they prefer to do so; so that an approved undertaking that the plaintiff will pay, &c., is enough, whether it be executed with or without *sureties*.

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Where it appears that the omission of the plaintiff to file the papers upon which an injunction is granted, as required by rule four of the court, is an inadvertence, the court have a discretion to relieve the plaintiff upon or without terms. Costs of motion imposed in this case.

UPON the summons and complaint in this action, with the usual affidavit of verification, and upon an undertaking executed by two persons, neither of whom is the plaintiff, an injunction order was granted by a justice of this court before the summons had been served on the defendants, and the injunction order was served with the summons and complaint upon each of the defendants. The summons and complaint upon which the injunction order was granted had not been filed when the notice of motion was served.

The defendants move to vacate the order of injunction, or dissolve the injunction, or set aside the service thereof, &c., on various grounds, viz: That the affidavits upon which the injunction was granted were not served therewith; that the injunction was granted and signed by the justice before the action was commenced (i. e., before the actual service of the summons on either of the defendants); that the undertaking was not executed by the plaintiff nor by any person on his behalf, but by sureties only; and that the papers upon which the injunction was granted were not filed within five days, as required by the rules of court. (Rule 4.)

The plaintiff showed that after receiving notice of this motion, he filed the papers, it having been omitted theretofore through inadvertence.

CHARLES E. JENKINS, *for plaintiff.*
BLISS & BARLOW, *for defendants.*

WOODRUFF, Justice. The objection that the affidavits upon which the injunction was granted were not served, is not insisted upon. The plaintiff's affidavit shows that

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no other affidavit than the complaint, duly verified, was presented to the justice for the purpose of obtaining an injunction. This is sufficient for that purpose. By the plain terms of section 219, a temporary injunction may be granted, when it "appears by the complaint" that a case exists in the plaintiff's favor, entitling him to have the defendant restrained. Whether under the language of section 220, requiring that "a copy of the affidavit" be served with the injunction, the complaint and verification are to be regarded as "an affidavit," as sometimes held; or the requirement of section 220 in this respect be held to relate only to cases in which the injunction is obtained upon affidavit (strictly so called), after the suit has been commenced; in either view it is sufficient to serve with the injunction the complaint and verification upon which it was granted.

The next objection denies the jurisdiction of the justice to grant an injunction order before the actual service of the summons.

The language of the 220th section is: "The injunction may be granted at the time of commencing the action, or at any time afterwards, before judgment," &c.; and section 99 declares that "an action is commenced as to each defendant, when the summons is served on him or on a co-defendant, who is a joint contractor, or otherwise united in interest with him;" and section 127, that "civil actions in the courts of record in this state shall be commenced by the service of a summons."

Under these provisions it is plain, I think, that an injunction order cannot become operative until the summons in the action has been served; and that the service of an injunction upon the defendant prior to the service of the summons would be irregular and ineffectual.

It does not follow, I think, that the injunction order may not be signed by the justice preparatory to such service, and be delivered by the justice to be served with the

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summons, although until the summons is served it has no effective operation.

The language, the injunction may be granted "at the time of commencing the action, or at any time afterwards," was meant to define two periods. If the summons must in all cases be served before the justice has jurisdiction to grant the order, then no injunction can issue until *after* the action *has been* commenced; and the words, "at the time of commencing the action," are without meaning and superfluous; but the Code means that a plaintiff may not only have an injunction *after* his action is commenced, but that he may have it at that *prior time* described by the words, "at the time of *commencing*" his action; and in this connection those words mean, while the work of commencing the action is going on, and not after it is finished.

It imports that the injunction may be obtained, so that it shall operate at the time when, and so soon as the action is commenced, and not alone after it is commenced.

This accords with good sense. It meets a very large class of cases, in which it is of vital importance to a plaintiff to enjoin the defendant at the very instant he is apprized that an action is commenced, and in which the defendant would, but for such injunction, defeat the very object of the suit.

The section which declares that the court is deemed to have acquired jurisdiction in a civil action, from the time of the allowance of a provisional remedy (§ 139), is in harmony with this construction, and sustains it.

The objection that the undertaking was not signed by the plaintiff, or his agent, or by some person who in very terms is described on the face of the undertaking, as acting "on the part of the plaintiff," raises a question in regard to which there has been some conflict of opinion.

The language of the 222d section, is that "the court or judge shall require a written undertaking on the part of

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the plaintiff, with or without sureties, to the effect that the plaintiff will pay to the party enjoined such damages," &c.

In my opinion the just meaning of this language is satisfied, and all the proposed benefits to the defendant are secured by construing the words, "on the part of the plaintiff," as simply words of contrast or opposition to the part of his adversary; and that an approved undertaking, executed by any persons of competent ability, agreeing that the plaintiff shall pay to the defendant the damages which he may sustain, if it be procured and furnished by the plaintiff or his attorney for the security of the defendant, is an undertaking *on the part of the plaintiff*, within the meaning of this section.

If this be not so, then, on the part of the plaintiff, can only mean "executed by the plaintiff." No other person can execute it who would not be (as between him and the plaintiff) a mere surety.

It is suggested that his agent or attorney may execute the undertaking. No doubt he may, but if he executes it by the plaintiff's authority, then it is, in law, the plaintiff's undertaking, and not his own; if he have no such authority, then he executes it just as any other person would execute it, binding himself, and not the plaintiff; and he is just as much a surety as any other person would be.

Suits are often necessary when a plaintiff is out of the state or sick, or under disability, or an infant, or otherwise incompetent, or unable to execute an undertaking, or to authorize any agent or attorney to do so. I cannot concede that it was intended that in such case no injunction should be issued.

The words "by the plaintiff, with or without sureties," had they been used, would be plain, and would require the plaintiff to execute them; but the words, "on the part of the plaintiff, with or without sureties," are fully

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satisfied, if any person or persons in aid of the prosecution, acting in furtherance of the action, at the instance of the plaintiff, will peremptorily and unqualifiedly undertake that the plaintiff shall pay to the defendant the damages which he may sustain.

The terms, "with or without sureties," would seem to indicate that whoever gives the absolute undertaking, whether it be the plaintiff himself, or some person or persons whom he or his attorney may procure, there may still be sureties if the judge so require. The forms of undertaking now in common use, make all the undertakers, in form and in fact, principals as between them and the defendant, and in that sense they are absolute undertakings on the part of the plaintiff, and not undertakings with sureties, and such is the undertaking in this case.

It is only in accordance with the language of the section under consideration, to say that an absolute undertaking that the plaintiff will pay (whether executed by him or by other persons), is an undertaking on the part of the plaintiff, and the court or judge may receive it if satisfactory, or he may require the security of others who shall execute in very terms as "sureties."

That those who sign as sureties may so express their obligation is plain. Often times they will prefer to do so, and the utmost that can be claimed by a defendant (if so much even be conceded) is, that there shall be a principal in the undertaking *in form*, and whom *he* can treat as *principal* without the necessity of demand or notice; and if the responsibility of such principal be inadequate, then that he may have sureties. This construction would harmonize with the claim that in using the terms, "with or without sureties," the legislature necessarily imply that there must be a principal, since otherwise there is no surety.

If a defendant bring his action on an undertaking in the form in common use, in which the undertaking is absolute, he will be the first to say, "as between me and

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yourselves, you are principals and not sureties." If so, then he has an undertaking given on the part of the plaintiff strictly *without sureties*.

Nor is it doubtful, I think, that an undertaking in the form, "I undertake and promise," &c., executed by one person, with a further agreement in due form by another person, by which he became *bound as surety*, would be a compliance with the statute in its terms, as well as its meaning, although the plaintiff signed neither. Indeed, if that form of undertaking had been introduced into use, I greatly doubt that this question would have ever arisen.

But as undertakings are in general in form absolute, binding all the signers as principals, it has happened that they have been called sureties, and somebody is sought for to be principal, in the terms "on the part of the plaintiff."

I repeat, that an approved absolute undertaking, that the plaintiff will pay, &c., is enough, whether it be executed with sureties or without sureties, and such an undertaking has been given here.

I am aware that there has been on this point, also, a difference of opinion. The late Chief Justice Duer, in *Richardson agt. Craig* (1 Duer, 666), held that similar words in the section (182) prescribing the undertaking to be given on obtaining an order of arrest made it necessary that the plaintiff should sign the undertaking. But he was compelled to make his own construction yield when the plaintiff was an infant, &c. In *Lief agt. Shausenburgh*, September 22, 1858, I am told that Chief Justice Bosworth held an absolute undertaking sufficient to justify an order of arrest, though neither signed by the plaintiff nor by any one professing to be his agent; and see also *Askins agt. Hearns* (3 Abbott, 184); *Bellinger agt. Gardner* (12 Howard, 381).

The last objection to the plaintiff's proceedings is, that he has not filed the papers upon which the injunction was granted, as required by the fourth of the rules of court.

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When the notice of this motion was given, the fact so stated was true, and the defendant had a right to his motion, and the court might vacate the injunction order upon that ground. But it appears by the affidavit on behalf of the plaintiff, that the omission to file the papers was an inadvertence, and so soon as the notice of motion was received the papers were filed. Under such circumstances the court have a discretion to relieve the plaintiff from the consequences of his omission, but as the defendants' motion is regular, such relief should be granted upon terms. Indeed, if the plaintiff had at once given notice of the filing, and sought a waiver of the motion, I would have allowed no costs to the defendant if he persisted in his motion.

All the other grounds of motion must be overruled, but upon this last point the motion must be granted, unless the plaintiff pays the costs of motion, \$7. If he pay those costs within five days the motion is denied.

COURT OF APPEALS.

ELI MYGATT, Jr., and GEORGE MYGATT agt. THE NEW YORK PROTECTION INSURANCE COMPANY.

The "act to provide for the incorporation of insurance companies," passed April 10, 1849, authorizes mutual insurance companies organized under the act, to issue policies of insurance for cash premiums, as well as for premium notes. The premiums paid by each member for the insurance of his property, constitute a common fund, devoted to the payment of any losses that may occur. And the cash premium represents the insured in the common fund, as well as the premium notes; and the insured is made a member of the company by the payment of a cash premium, as well as by giving a premium note. (DENNIE and WELLES, J. J., dissenting.)

March Term, 1860.

THIS cause was first tried before the Hon. DANIEL PRATT, as sole referee, who decided that the policy in action was

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issued without authority, and void. On appeal to the general term in the fifth district, from the judgment entered on the decision of the referee, the judgment was affirmed. The plaintiffs appealed to this court, and the first argument heard at the March term, 1859, and at the September term following a re-argument was ordered, which re-argument was had at the January term, 1860, and the decision made on the 13th of April, 1860.

The facts in the case appear in the opinion of the court.

MENRY R. MYGATT, for the appellants.

FRANCIS KERNAN, for the respondents.

SELDEN. It appears from the report of the referee in this case, that the defendants were organized as a Mutual Insurance Company, under the general act of 1849; that the policy upon which the suit is brought was duly issued, and the premium paid; that all the conditions on the part of the insured were kept and performed; that the property was destroyed by fire, as set forth in the complaint, and that the demand arising from the loss had been assigned before suit to the plaintiffs. The defence which prevailed at the trial, and which is relied upon here, is that the defendants having been organized as a mutual company, had no authority to issue policies for premiums to be paid in cash, and consequently that their act in issuing the policy in question was *ultra vires*, and the policy void.

I shall assume for the purposes of this case, that the defendants can avail themselves of this defence, and that that they are in no manner estopped from insisting upon their own want of power. The question then is, did the defendants exceed their corporate powers by issuing this policy and receiving the premium upon it?

The charter adopted by the defendants, which was introduced and proved upon the trial, contained the fol-

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lowing clause: "Any person applying for insurance, so electing, may pay a definite sum in money, to be fixed by said corporation, in full, for said insurance, and in lieu of a premium note." The policy in question here was issued in strict accordance with this provision. The defendants, therefore, to sustain their defence, must show that the company had no authority to insert such a clause in its charter, and this depends entirely upon the provision of the act of 1849, under which the company was organized.

By section 3 of that act, it is enacted that persons intending to become incorporated under it, shall file in the office of the secretary of state, a declaration signed by all the corporators, expressing their intention to form a company, for the purpose of transacting the business of insurance, as expressed in the several subdivisions of the first section of this act, which declaration shall also comprise a copy of the charter proposed to be adopted by them; and section 10 provides that "it shall be the duty of the corporators of any and every company organized under this act, to declare in the charter which is herein required to be filed, the mode and manner in which the corporate powers given under and by virtue of this act are to be exercised."

These provisions confer upon the companies organized under the act, a broad and unrestricted power to prescribe for themselves, the manner in which they will conduct the business of insurance. They virtually transfer to these companies full legislative control over the subject, and construed by themselves, would invest each company, whether joint stock or mutual, with the power to provide for any kind of insurance authorized by the act. The only express limitation upon this power is contained in section 11, which requires that the charter "shall be examined by the attorney-general," who, if he finds it "to be in accordance with the requirements of the act, and not inconsistent with the constitution or laws of this state," is

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to "certify the same to the comptroller," &c. It cannot be pretended that the clause in the defendants' charter, under which this policy was issued, is in any manner repugnant either to the constitution or the general laws of this state. The only question therefore is, whether it is in conflict with anything contained in the act of 1849 itself. Unless the defendants can find something in *that act* which prohibits companies organized as mutual companies from receiving their premiums in cash, they cannot maintain their defence.

There is clearly nothing in the terms of the act which contains such a prohibition; but the restriction is sought to be deduced by implication from those provisions of the act which discriminate between joint stock and mutual companies. It is based mainly upon sections 3, 4 and 5. The charter which persons willing to become incorporated, are required by section 3, to file, is as we have seen, to prescribe "the mode and manner" in which their "corporate powers" are to be exercised. Section 4 authorizes the company, after filing such charter, "to open books for subscription to the capital stock of the company," "or in case the business of such company is proposed to be conducted on the plan of mutual insurance, then to open books to receive propositions," &c.

It is there provided (§ 5) that no "joint stock company" shall be organized in the city of New York or the county of Kings, with a smaller capital than \$150,000, or in any other county with a smaller capital than \$50,000; and that no company formed for the purpose of doing business "on the plan of mutual insurance" in either of the counties of New York or Kings, shall commence the business of fire or inland navigation insurance, until agreements have been entered into for insurance with at least one hundred applicants, the premiums on which shall amount to \$100,000, for which premium notes are to be taken "in

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advance," as a "part of the capital stock" of the company.

Now, the argument on the part of the defendants is, that there having been in this state previous to the act of 1849, two distinct and well known classes of insurance companies, viz., joint stock and mutual companies, organized upon different principles, and transacting their business in different modes, it was the evident design of the legislature, as evinced by the provisions to which I have referred, to keep these two classes of companies entirely distinct, and to prevent any intermingling of the two modes of insurance in the same company. That insuring for a specific premium, payable in cash, is the appropriate business of a joint stock company, organized with a view to profit upon its capital, the corporators in which consist not of persons holding policies, but of the owners of this capital; that a mutual insurance company is composed exclusively of the persons insured, and is organized by its members not with a view to profit, but for the sole purpose of mutually insuring each other; that it is essential to such a company that every person insured should be a member of the company, and an insurer of all the other members, as well as insured by them, and that one who pays the premium upon his policy in cash, and is liable for nothing more, does not become a member of the company, and is in no sense an insurer of others holding its policies; that there is no mutuality, therefore, between such a person and those who have given premium notes, liable to be assessed for future losses, and hence that issuing policies for cash premiums is a departure from the legitimate business of a mutual insurance company, and subversive of that distinction between joint stock and mutual companies, which it was the design of the legislature to preserve.

This argument, it will be seen, consists of two branches, viz., first, of that construction of the act of 1849, which

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holds that a strict line of demarcation was intended to be drawn between the two classes of companies, and that when a company had once made its election to organize, either as a joint stock or a mutual company, it was the object of the act that it should be ever thereafter rigidly confined to that mode of insurance which is appropriated to its class; and secondly, of the assumption, that there is something in the taking of a specific cash premium *in full* for insurance, without further liability on the part of the insured, which is repugnant to the nature and principle of a mutual insurance company. The defendants are under the necessity of maintaining both these propositions. If they fail in respect to either, they fail in their defence. If evidence of that inflexible determination to keep the two kinds of companies entirely distinct, for which the defendants contend, is not to be found in the act, or if the taking of a cash premium *in full* for the insurance, can be reconciled with the "mutual principle," as it is called, then of course there is no objection to this policy.

Let us examine these two points separately. On what does the assumption of such a determination on the part of the legislature rest? There is clearly no *good reason* why the legislature should have provided for so rigid a separation of the two species of insurance companies. That it was never supposed there was any ground of policy which required that mutual insurance companies should be prohibited from receiving cash premiums, is conclusively shown by the course of legislation on the subject. Acts have been repeatedly passed conferring upon such companies this power, in the precise terms used by the defendants in their charter. It was conferred upon the Albany County Mutual Insurance Company in 1848; upon the Herkimer County Company in 1850, and upon various other companies in subsequent years. The legislature seem to have been ever ready upon request, to

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authorize these companies to receive their premiums in cash instead of premium notes.

There is no public reason why such a company, when it has once acquired a substantial basis for its business, should be rigidly confined to the mutual system; that system was not devised by the legislature for the protection of the public, but by individuals for their private benefit. It does not rest upon any foundation of public policy. Why then should the legislature, in enacting a general law providing for the organization of all insurance companies, so adjust its provisions as to inhibit mutual companies from transacting any portion of their business in a manner which has so often received the legislative sanction? The very object of the law being to prevent the necessity of repeated applications to the legislature by those desirous of engaging in the business of insurance, we should naturally expect its provisions to be so framed, as to enable mutual companies, under proper guards and restrictions, to avail themselves of that privilege which the legislature has shown itself in so many instances ready to confer. A contrary intent ought certainly to be made very clearly to appear, before its existence is assumed.

The question then upon this point is, whether those provisions of the act of 1849, already referred to, discriminating to some extent between joint stock and mutual companies, exhibit an implied intention to prohibit mutual companies from issuing cash policies. It is indispensable for the defendants to maintain the affirmative of this; because, as the power of the companies, under section 10, to frame their own charters, is conferred in *unrestricted* terms, they may of course provide for this class of business, unless the limitation of this power, upon which the defendants insist, is elsewhere found; and there is no portion of the act other than that referred to, from which such limitation can by possibility be deduced.

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But the discrimination in sections 4 and 5, between the two classes of companies, had another obvious purpose, which was fully answered when the respective companies were once organized and ready to commence their operations. The main reliance of all insurance companies for the payment of losses, after becoming once fairly established, is upon the sums received for premiums. But losses may occur before their accumulations from this source are sufficient to meet them. For this reason it was deemed wise and prudent on the part of the legislature, to provide that every insurance company, whether joint stock or mutual, should have at the outset a fund sufficient to meet its early losses; and as mutual companies have not, like joint stock companies, a cash capital, it became necessary in arranging the provisions on this subject, to discriminate between the two.

That this was the sole object of the discrimination in question, to me seems plain. Sections 4 and 5 relate to this preliminary fund and to nothing else. They require a joint stock company in the country, before commencing business, to have a cash capital of fifty thousand dollars, and a mutual company a capital of one hundred thousand dollars, composed of promissory notes given in advance for premiums. These notes would represent risks incurred or to be incurred, while the cash capital would not, and hence the difference in amount. The legislature evidently considered the one hundred thousand dollars in notes equivalent to fifty thousand in cash. What reason can there be, after the company is once formed, with such a preliminary fund, pronounced adequate by the legislature, why a mutual company should not, as well as a joint stock company, if it chooses to incur the risk, issue cash policies. The public and all those who deal with the company, have the same security in the one case as in the other. They have the same preliminary fund, and the same accumulations from the premiums received. The

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question of receiving cash premiums in full for policies after a company has once obtained sufficient capital to justify it in commencing business, is a question for the consideration not of the legislature, or of the public, but of the corporators themselves. The public have no special interest in it. The premiums received, if graduated upon just and proper principles, will strengthen one of these companies to precisely the same extent as the other; and will afford the same additional guaranty to parties insured for the payment of losses.

We see, therefore, very plainly why every mutual company once established, which has asked of the legislature the favor, has obtained the power to issue cash policies, and we can hardly fail also to see that when the legislature in the act of 1849, had provided that all mutual companies should have a sufficient fund upon which to begin their operations, they might safely be allowed, as by section 10 they are allowed to prescribe for themselves the mode and manner in which they would conduct their business. This construction gives full force and effect to every provision of the act of 1849, and exempts the legislature from the imputation of having so framed a statute designed expressly to render such applications unnecessary, as to require in every instance a special application for a favor which reason and the practice of the state alike show, it would be a matter of course to grant.

But this is not all, the statute bears upon its face unequivocal evidence that the legislature did not intend to erect an impassable partition wall between the two kinds of companies. Section 21 provides as follows: "It shall be lawful for any mutual company, established in conformity with the provisions of the fourth section of this act, to unite a cash capital to any extent, as an additional security to the members, over and above their premiums and stock notes, which additional cash capital shall be left open for accumulation, and shall be loaned and invested

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as provided in the eighth section of this act; and the company may allow an interest on such cash capital, and a *participation in its profits*, and prescribe the liability of the owner or owners thereof, to share in the losses of the company; and such cash capital shall be liable as the *capital stock* of the company in the payment of its debts."

It has been suggested that this is a mere authority to borrow money. But this idea can hardly be reconciled with the provisions of the section. If the contributors of the additional fund are "to participate in the profits" of the business, and if the fund itself is "liable as the *capital stock* of the company," to the payment of its debts, then such contributors are to all intents and purposes partners in the company and not its creditors. The section authorizes the company "to prescribe the liability of the *owner or owners*" of the additional capital to share in the losses of the company. But if the money is borrowed, it would belong to the company itself, and not to the contributors, as this provision plainly contemplates.

Again, the fund is to be kept open for accumulation. This cannot mean that the company shall continue to borrow. It can only mean that additions may be made from time to time to the subscribed capital, it being assumed that every such addition would strengthen the company. The whole section exhibits an intent that those who contribute the additional capital should be associates in and not creditors of the company, and any other supposition is inconsistent with its language and structure. It is true, as has been said, that no such cash capital was added by the defendants to the funds of this corporation. But the section has, nevertheless, a most important bearing upon that which is made the turning point in the present case. The whole argument, on the part of the defendants, rests upon the assumption that an intent is to be gathered by implication from the general act of 1849, that there should be no intermingling of the two modes of insurance in the

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same company. Now, section 21 conclusively proves the contrary. It shows even a solicitude on the part of the legislature, by providing that the additional fund shall be left open for accumulation, to add the stock feature, and of course the system of cash premiums to the mutual companies.

That the legislature contemplated the issuing of cash policies to some extent, by all mutual insurance companies, is evident from the very section upon which the argument on the part of the defendants is mainly based. The notes provided for in section 5, which constitute the capital upon which a mutual company is to commence their business, are not premium notes to be assessed when losses occur; but are payable absolutely, irrespective of all losses, so it was held by this court in the case of *White agt. Height* (16 N. Y. R., 310). They are the same, therefore, as so much money advanced to the company for premiums upon policies thereafter to be issued. The idea of these notes was evidently borrowed from the charters of a class of mutual insurance companies, of which the Atlantic Mutual, chartered in 1842, was the type. Section 12 of the charter of that company, provides that "The company, for the better security of its dealers, may receive notes for premiums, *in advance*, of persons intending to receive its policies, and may negotiate such notes for the purpose of paying claims or otherwise, in the course of its business."

This was the first appearance in our statutes of this mode of obtaining, by a mutual insurance company, of a preliminary fund upon which to commence its business, and it was adopted by the legislature in enacting the general law of 1849.

The charter of the Atlantic Mutual clearly contemplated the repayment of these advances, by the issuing of cash policies, because no provision was made for the issuing by that company of any other, and it is very clear that the same mode of repayment must have been contemplated

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under the general law. My conclusion, therefore, would be, that if the policy in question is to be regarded as issued to a mere outside party, without any reference in itself to the principles of mutuality, it would nevertheless be valid and binding.

If, however, we assume the contrary, and suppose it to be indispensable, that the mutual principle, as it is called, should be observed in all the policies issued by a mutual company, the result I think would not be different.

It is somewhat difficult to ascertain with precision in what this mutual principle so strenuously contended for is claimed to consist, as mutual companies have assumed a great variety of forms. But I will suppose, for the purpose of this case, that it involves all the requirements suggested on the part of the defendants. The most prominent among the requisites insisted upon as constituting a mutual insurance is, that the party who is insured should thereby be brought into mutual relations with the insurers by becoming a member of the company issuing the policy. It seems to be supposed that this was not the case with the party to whom the policy in question here was issued. An examination, however, of the charter of the company will clearly show the contrary. Article 5, among other things, provides as follows: "The directors shall be elected by the persons holding policies of insurance in this company, or their proxies, and one vote shall be allowed on every one hundred dollars insured." Thus every person holding a policy issued by the company is made a member of the corporation, and entitled to a vote therein, entirely irrespective of the question, whether the premium upon such policy was paid in money or by a premium note; and his interest is measured upon a principle which is perfectly equal and just, viz., by the aggregate amount insured.

If it be said that mutuality also requires that there should be some sort of *ratable equality* between those who pay their premiums in cash and those who give notes, this

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is easily attained. When the present value of a life annuity or of a right of dower is estimated upon principles which experience has established, the sum arrived at is, in the eye of the law, just equal to the contingent interest which it represents. So when the chances of liability upon a premium note are calculated upon principles similar, if not exact, a sum is found which may be regarded as equivalent to the contingent liability upon the note. Indeed, all premiums for insurance are calculated upon this principle. That equality may then be produced is conceded, but two answers are suggested. In the first place, it is said that it is not shown that the premium in this case was the result of any such calculation, and that the *presumption* is that it was not. Now, I am unable to see upon what foundation such a presumption can rest. I have supposed that where a transaction would be legal, if done in one way, and illegal if done in another, and there was no evidence on the subject, it was to be presumed to have been done according to law. Here, however, a presumption is to be raised in favor of this company, that it was guilty of a violation of law to enable it to escape from the obligation of a contract, the consideration for which it has received and still retains. In my opinion the presumption is directly opposite to that thus suggested. It was not necessary that anything should appear in the charter or by-laws on this subject. It was a matter of calculation, to be adjusted upon fixing the premium.

The provision in the charter, however, as it seems to me, does imply that the premium was to be calculated upon the precise principle which has been here suggested. The cash premium was to be "in lieu of," that is, was to take the place of a premium note. This implies that it was to be made equal to such note, which for all substantial purposes it would be if calculated in the mode here pointed out.

The other answer given to this view of the case is, that

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the principles of mutual insurance require that every person insured upon that plan, should be also himself an insurer; that is, that each person insured must also be an insurer of all his associates, as well as insured by them; and it is said that an insured person who has paid a premium of a definite sum, in the language of the defendants' charter, "is *full* for such insurance," and who, therefore, is not responsible for anything more, cannot be a mutual insurer, because he is not in any sense an insurer at all. This argument is based upon what I regard as an erroneous view of the true distinction between a mutual and a joint stock company. Indeed, much of the difficulty on the subject has been produced by attaching a meaning to the word mutual in its connection with insurance, which does not belong to it. A mutual insurance company is simply a company whose funds for the payment of losses and expenses, consist not of a capital subscribed or furnished by outside parties, but of premiums *mutually* contributed by the parties insured. Angell says: "A mutual insurance in its origin was a body of persons, each of whom was desirous of effecting an insurance, and he agreed with the rest of the members to contribute the premiums to a common fund, *on the terms* that he should be entitled to receive out of that fund." (*Angell on Fire and Life Ins.*, § 413.) There is not a word about the parties being insurers of each other, further than as they were made so by the payment of a cash premium. They made up a common fund by means of these common or *mutual* contributions, upon which each had a claim for any loss in respect to the property insured. There was no responsibility beyond that, and this is all that is essential to a mutual company. The "mutual principle," as it is called, requires nothing more. Joint stock companies have a subscribed capital; mutual companies do not, but depend upon their premiums. This is what distinguishes them;

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and whether the premiums are paid in cash or by notes has nothing to do with the distinction.

Granting it, however, to be necessary that all those who are insured in a mutual company should also be insurers, the person who took this policy was so. He became, as has been shown, a member of the company, and interested in its funds in proportion to the amount of his policy, and to the extent of that interest he was an insurer of all other members.

It is no answer to this to say that mutual companies contemplate only indemnity against loss, and not the accumulation of a fund to be divided among the corporators. This depends upon the manner in which they conduct their business. There is nothing to prevent a mutual company from carrying on its operations with a view to profit and dividends. Indeed, the act of 1849 plainly contemplates that they will, or at least that they may do so, when it provides in section 21 that they may allow to parties contributing a cash capital a "participation in its profits."

But were this question not as clear upon principle as I think it is, it may be regarded as settled by authority. What is claimed on the part of the defendants is, that issuing policies for premiums payable in money, is not appropriate business for a mutual insurance company, or at all events for one which also takes premium notes subject to assessment; that it assimilates such company to a joint stock company, which the act of 1849 does not permit; and that there is a want of mutuality between those paying cash premiums and those who give notes. The same question received the deliberate examination of the supreme court of Ohio, in the case of the *Ohio Mutual Ins. Co. agt. Marietta Woolen Factory* (3 Ohio State R. N. S., 348). The company in that case was incorporated in 1843. In 1844, an act was passed to amend the charter, which contained two sections. Section 1 provided, in almost the same terms with the provisions in the defend-

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ants' charter, that any person applying for insurance might elect to pay "a certain definite sum of money, *in full*, for such insurance," which sum was to be "in lieu and place of a premium note." Section 2 devoted the funds arising from cash premiums and the premium notes, in general terms, to the payment of losses and expenses, saying nothing about assessments, but required the cash fund to be first exhausted. The directors there took ground precisely analogous to that taken here, viz., that this change in the business of the company changed its character from "purely mutual company to what they called a mutual stock company." Hence they disregarded the provisions in their charter, which subject the premium notes to contribution for such losses only as should accrue while the makers were members of the company, and treated the cash premiums and premium notes as joint capital, subject to be applied indiscriminately to all losses, except that the cash premiums were to be first exhausted.

RANNEY, J., after stating the conclusion of the directors, said: "In this we think they were *most clearly wrong*. No such radical change is or was intended to be effected by this act. It was still a mutual insurance company, with no power in the directors to control its assets, as an independent company, or to divert them from the purposes to which the law and the contract of the parties had appropriated them.

Every person insuring, whether by the payment of a cash premium, or the deposit of a premium note, *still became a member of the company*, and this act simply gave the *election* to him, whether he would become a member in the one way or the other." Again, he says: "The cash premium belongs precisely where the premium notes, whose place it takes, would belong, and is subject to the same appropriation, with this modification, it must be first applied, and no part of it can be withdrawn upon the

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expiration of the policy, although it should not have been all expended. There is no difficulty in the practical working of this construction."

This case decides every point raised by the defendants here, because although, there, the taking of cash premiums was authorized directly by the legislature, yet if this did not change the character of the company; if it was "still a mutual insurance company;" if those who paid cash premiums became members of the company," and the premiums paid took the place of premium notes, and if there is no practical difficulty in the working of such a system, then there can be no objection to the adoption by the defendants of the clause in their charter which authorizes it.

But the question under our own statute, and in precisely such a case as that now before us, has been passed upon by the supreme court of the United States, in the case of the *Union Insurance Company* agt. *Hoge* (21 *How. U. S. R.*, 35; *s. c.*, 17 *How. Pr. R.*, 127). The company, in that case, was incorporated in this state under the law of 1849, and its charter was identical with that of the defendants' here. The action was brought upon a policy, the premium upon which had been paid in money. The case appears to have been elaborately argued, and among the objections made by the counsel for the company to the issuing of cash policies, is the following: "That it destroys the principle of *mutuality*, which is the leading characteristic of mutual companies formed under the law of 1849, and confounds the operation of a company organized to do business on the mutual plan, with that of those companies which are organized on the plan of stock companies, and which are in their nature and principles antagonistic to the mutual companies."

On this point the court, by *NELSON*, J., say: "It is argued, however, that the company in question is a mutual insurance company, as declared by the act; that according

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to this system the insured must be a member of it, and that a person insured upon a cash premium without any further liability, cannot be a member. *This argument is not well founded*, either upon principle or authority. Admitting that the insured must be a member of the company, he is made so by the payment of the cash premium. The theory of a mutual insurance company is, that the premiums paid by each member for the insurance of his property *constitute a common fund*, devoted to the payment of any losses that may occur. Now, the cash premium may as well represent the insured, in the common fund, as the premium note; and this class of companies has been so long engaged in the business of insurance, it may well be that they can determine with sufficient certainty for all practical purposes, the just difference in the rates of premium between cash and notes. These mutual companies, possessing the authority contained in the eighth section of this charter, namely, to take cash premiums or premium notes, are at the present day in operation in several of the states, and it has never been supposed that the mutual principle has been thereby abrogated."

I have quoted thus largely from the opinion of Judge NELSON, because in my view the extract given answers so fully every phase of the argument for the defendants here, that there is but little necessity for saying more. When it is considered that the term "mutual," as applied to an insurance company, does not import any peculiar and exact method of producing mutuality in the sense of *equality* among its members, but that it is simply significant of an association for the purposes of insurance, whose fund for the payment of losses, consists not of a capital furnished by uninsured parties, but of the premiums *mutually* contributed by the persons insured, all difficulty on the subject is at an end. That such is the import of the term, appears not only from the opinion of Judge NELSON, but from all the other authorities on the subject.

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The judgment in this case should, I think, be reversed, and there should be a new trial, with costs to abide the result.

COMSTOCK, DAVIES, BACON, CLERKE and WRIGHT, Judges, were for affirmance. DENIO and WELLES, Judges, dissented.

SUPREME COURT.

WILLIAM MURDOCK agt. ELIZA A. EMPIE and others.

A resale of mortgaged premises on foreclosure, ordered on terms, where, among other circumstances of suspicion, it appeared that the agent of the mortgagor induced the latter to believe that a certain sum (near the value of the premises) would be bid by a responsible party, and requesting the mortgagor not to attend the sale; and that, on the sale, the premises were struck off to the party named for \$2,500, less than the sum mentioned, being more than 10 per cent less than the actual value of the premises.

Besides, it appeared that the result of the sale, if carried out, would probably involve the mortgagor in the loss of all her property, and leave her liable for a large deficiency on the second mortgage.

It is in the discretion of the court to order a resale on foreclosure of mortgaged premises, although the sale may be more than 10 per cent less than their value; but a sale of premises ordered by a *surrogate*, must be set aside, and a resale ordered, in pursuance of the statute where such a deficiency appears on the sale.

MOTION for a resale of mortgaged premises. The action was brought to foreclose a mortgage on real estate, and a decree made for the sum of \$11,042. There was a subsequent mortgage held by parties who were made defendants, upon which a sum a little exceeding \$3,300 was due. At the sale, the premises were bid off by one Rosenfeld, for the sum of \$12,500. The defendant, Eliza A. Empie, who was the owner of the equity of redemption, and the other defendants, who were subsequent mortgagees, now moved to set aside the sale, and for a resale of the mortgaged premises.

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The affidavits disclosed that the premises were worth between \$15,000 and \$16,000; that one Lloyd, who had been acting as agent for the defendant, Eliza A. Empie, in reference to the property, represented to the defendants previously to the sale that he was authorized by Rosenfeld to bid \$15,000 at the sale, and that it would be unnecessary for them to attend the sale on that account. In consequence of such information the defendants did not bid at the sale, and the premises were struck off to Rosenfeld for \$12,500.

D. McMAHON and J. A. SHERMAN, for the motion.

BANKS & HURST, for the plaintiff.

M. MACLAY and A. J. PERRY, for the purchaser, and in opposition.

INGRAHAM, Justice. The papers in this case show that the property was sold below its real value, and that on a resale it will bring an amount equal to the price bid, and ten per cent thereon.

If this sale had been made by the order of the surrogate, those facts might be sufficient to authorize the court to order a resale, as was said in *Kain agt. Masterton* (16 N. Y. R., 176).

That rule, however, as applied to surrogates, is not sufficient in mortgage sales. The statute (2 R. S., 105, § 33) makes it the duty of the surrogate to order a resale in such a case. There is no such statute relating to sales on the foreclosure of mortgages. On such sales parties interested are supposed to be able to attend to their interests at the sale, and do not require the same protection that should be extended to the sales of property of the estates of deceased persons; something more is necessary in relation to the sales of land under foreclosure (26 Wend., 143).

I am not, however, satisfied that the sale was conducted

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in a way free from suspicion. Lloyd admits that he told Mrs. Empie that he thought Rosenfeld would bid \$15,000. He does not deny what is stated by Empie, that he wished her not to bid, and he would take care of her interests; and the subsequent proposition, by which Lloyd was authorized to sell the property immediately at \$16,000, does not furnish any additional evidence of good faith in the proceeding.

When, in addition to these facts, it appears that the result of this sale, if carried out, will probably involve the mortgagor in the loss of all her property, and leave her liable for a large deficiency on the second mortgage, I am of the opinion that justice will be promoted by ordering a resale of the premises. (*King agt. Morris*, 2 Abbott P. R., 216; *id.*, 294.) This, however, can only be done on the following conditions:

1st. The purchaser must be indemnified against loss. For this purpose, in addition to the return of the 10 per cent paid by him on the sale, he must be paid the disbursements made by him, including the auctioneer's fees, and one hundred dollars to satisfy any expenses he may have been put to in examining the title, &c.

2d. The defendant must file a bond, with sureties, to be approved by a judge, that at least \$14,000, and the expenses of the resale, shall be bid by a bona fide bidder at the next sale.

3d. Pay the costs of this motion.

If these terms are complied with within six days from service of notice of this decision, the motion for a resale is granted, otherwise the same is denied.

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SUPREME COURT.

GEORGE CATLIN, respondent, agt. CHARLES H. COLE and others, appellants.

After a cause has been heard and determined by the *general term*, and an appeal taken to the court of appeals, it is too late to send the case back to the referee who tried the cause, for an *entire resettlement* or *restatement* and *refinding* of the facts by the referee.

Where some particular exception to a decision, or to some separate proposition in the charge of the judge is accidentally omitted in the bill of exceptions, and not discovered until the appeal has been taken to the court of appeals, it is proper that the *specific error* should be corrected and the omission supplied.

Kings Special Term, March, 1860.

MOTION by defendants to refer back this action to William Kent, Esq., the referee, before whom the same was tried, to amend and settle or resettlement the case and exceptions, and to separate therefrom the exceptions stated therein, in such manner, and so duly to present to the court of appeals the questions of law which ought to be examined by such court on the appeal taken by the defendants to said court of appeals, and to amend and resettlement the findings of facts and conclusions of law of the said referee, so as to fitly present the questions to be examined, &c. The motion, among other papers, was founded upon a copy of an order of the court of appeals, as follows: "Court of Appeals, January 6, 1860. A motion having been made by the appellants that they have leave to move in the supreme court for a resettlement of the case made after the trial; and it being the opinion of this court that if the case needs any resettlement, it should be done by and before the referee who tried the cause, and no opposition to the motion being made on the part of the respondent, it is ordered that the said motion be, and the same is hereby granted. The court, however, expressing no opinion upon the question, whether the case, as already

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settled by the referee, does or does not conform to law and the practice of the court."

M. DANE ELLINGWOOD and HENRY WHITTAKER, for the motion.

W. I. STREET, opposed.

BROWN, Justice. The order made by the court of appeals on the 6th of January, 1860, which appears to have been granted in the absence of the respondent, does not direct that the case in this action be resettled. If it needs to be resettled, it directs it shall be done by the referee who tried the action, but expresses no opinion upon the question, whether the case as already settled by the referee, does or does not conform to the law and practice of the courts.

If the 38th rule of this court, to which I am referred, applies to a case heard at the general term, and decided upon the facts and the law found by the referee, and spread out at length upon the papers, it can require no more than that the general term or the judge who delivers the opinion shall say, I determine, by the order of the court, that the general term do find the same facts as were found by the referee before whom the cause was tried, and that such facts be annexed to the judgment roll, as the facts found by the general term. This has already been done by the order of the special term of the 19th of October, 1859.

The general term of the supreme court is a court of appeal and nothing less, with power to review the judgments and decisions made by referees, as well as by the special term. The court of appeals entertains appeals from the judgments of the general term, upon the same state of facts as were presented to the general term, and no other. Cases will doubtless occur when some word or exception to a decision, or to some separate proposition in

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a charge of the judge is accidentally omitted in the bill of exceptions, and not discovered until the action has been removed to the court of appeals. In all such cases it is quite right that the specific error should be corrected and the omission supplied. But I do not recognize the regularity of a practice which would authorize an entire resettlement of the case, and a restatement and refinding of the facts found by the referee, after the cause has been heard and determined by the general term. This is the relief demanded by the defendants on this motion; and if it should be granted, the case in the court of appeals would not, perhaps, be at all like that which was heard at the general term.

The facts have been carefully and fully found by the referee. They occupy some twenty-three folios of the case, and are signed by the attorneys who appeared for the parties in the action. I do not see that I can do otherwise than adhere to the order of the special term of the 19th of October, 1859, which has not been reversed or modified.

The defendants' motion must be denied, with ten dollars costs of opposing the motion.

SUPREME COURT.

JAMES BROWN and others agt. THE NEW YORK AND ERIE RAILROAD.

Where the *order* appointing a receiver of the defendants' property, authorized him "to pay the amounts due and maturing for materials and supplies about the operation and for the use of said road." Held, that it could not properly be construed to include the payment of a renewed *promissory note*, originally made by the company in payment of a claim for re-rolling iron for the use of the road in 1856 or '57.

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PETITION for payment by the receiver of the defendants, of plaintiff's claim.

INGRAHAM, Justice. The petitioners hold a note of the Erie Railroad Company, given in renewal of previous notes which were originally made by the company in payment of a claim for re-rolling iron for the use of the road, in 1856 or '7. They now move for an order directing the receiver to pay this amount. The order appointing the receiver, authorizes him "to pay the amounts due and maturing for materials and supplies about the operation and for the use of said road."

Although the authority here conferred might be so construed as to include this claim, I cannot conclude that such was the intent of the court when the order was made. The extent to which that should be construed, is to confine such payments to persons who had furnished materials within a short time previous for repairing or operating the road. It was not intended, and ought not to be construed as extending to any claims for materials furnished at any time previous, either for construction or any other purpose, especially after such claims had matured, have changed into promissory notes, and which notes have been sold in the market, and from time to time renewed.

Under such a construction of the order, the whole proceeding for the foreclosure of the mortgages would become inoperative and useless. It would not only cover claims upon notes, but might also be extended to cases where iron or other materials had been purchased with bonds for the original construction of the road, which could with as much propriety be presented to the receiver for payment, as the note under consideration.

The provision is loosely drawn, and the wisdom or legality of it to any extent beyond that of paying for supplies of materials, or labor received, by the receiver at his appointment, is not at all clear.

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If the court may set aside the rights of mortgage bond-holders, to pay old debts of an inferior class, in one instance, it may be done to any extent; and instead of securing the holders of the bonds of the company by the mortgage given for that professed object, their rights are by such orders made to yield to, and their claims made secondary to others not secured, and without any other limit than the discretion of the court. I do not understand such to be the effect of a mortgage. On the contrary, when the mortgage is forfeited by nonpayment, the parties holding it are entitled first to be paid, and the right to authorize any other payments to be made, even for subsequent supplies, can only be justified by the necessity of keeping the road in operation for the benefit of the creditors themselves, who seek to obtain payment of their debts.

I do not think the order warrants the payment asked for, and even if it did, it seems to me to be so much at variance with the rights of the plaintiffs, and those who are represented by them, that I should be unwilling to make an order directing the payment.

Motion denied, without costs.

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SUPREME COURT.

JAS. SHOEMAKER agt. JOHN H. MCKEE and MARY H. MCKEE.

A wife may be a witness in her own behalf in an action, although her husband be joined with her as a party.

Section 399 of the Code is sufficiently comprehensive to authorize the wife to be a witness in her own behalf, and the husband in his own behalf, whether they be co-plaintiffs or co-defendants, or whether the action be brought by or against the other.

Broome General Term, May, 1860.

Present, MASON, BALCOM and CAMPBELL, Justices.

This action was brought to set aside a deed of a lot of

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land, on which there was a house, situated in the town of Veteran, Chemung county. The deed was executed by Solomon Bennett, in 1856, to the defendant, Mary H. McKee, the wife of the other defendant, John A. McKee. The plaintiff alleged in his complaint, that this lot of land was paid for by John A. McKee, and that the deed of it was taken by his wife, and in her name to hinder, delay and defraud the creditors of said John A. McKee. The plaintiff signed two promissory notes, as surety for the defendant, John A. McKee, on which he and said John were sued, and judgments were obtained against them. The plaintiff paid the persons who obtained said judgments, what was due on them, and took assignments of them to himself. He afterwards issued executions on them, which were returned unsatisfied. He then instituted this action, as a judgment creditor of said John A. McKee, to set aside the aforesaid deed as fraudulent, and to obtain satisfaction of said judgments out of the land conveyed by said deed. The defendants answered jointly, and denied the allegations of fraud in the complaint. They set up as a defence that the defendant, John A. McKee, obtained a land warrant, from the United States, for services as a soldier in the war of 1812, and let his wife have it for a debt he owed her for property that came to her from her father; that he, John A. McKee, located land under said warrant, for the benefit of his wife, and received a deed or patent therefor from the United States in his own name, but for the benefit of his wife; and that the land thus obtained was conveyed to Bennett for the lot in Veteran, that the latter conveyed to Mrs. McKee.

The action was tried before a referee. Mary H. McKee was offered as a witness *in her own behalf*. The plaintiff objected to her being sworn or testifying as a witness in the cause, on the ground that she was the wife of the defendant, John A. McKee, and therefore could not be a witness or testify in the cause. The referee overruled the

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objection, and Mrs. McKee was sworn as a *witness* in her own behalf, and gave evidence that showed, or tended to show, that the lot of land in Veteran was paid for with property that equitably belonged to her. The referee decided that the defendants were entitled to a judgment against the plaintiff for costs. Judgment was entered on the referee's report against the plaintiff for costs, and he appealed therefrom to the general term of the court.

THURSTON, HART & BENN, *for plaintiff.*

DUNN, SPAULDING & BABCOCK, *for defendants.*

By the Court, BALCOM, Justice. No question has been raised as to the right of the plaintiff to maintain the action as a judgment creditor. It seems to be conceded by the defendant's counsel that his rights are the same they would have been if he had recovered the judgments in his own name against the defendant, John A. McKee, and issued executions on them against his property, which had been returned unsatisfied; and the case shows that this much must have been admitted on the trial.

It does not appear whether John A. McKee obtained his land warrant from the United States, under the act of congress of September 28, 1850, or the act that was passed in 1855; and I presume it is immaterial under what law of congress it was obtained; for the case fails to show that the defendants have at any time insisted (and they do not now insist) that the warrant or land located under it could not be taken to satisfy the debts, for which the plaintiff's judgments were recovered, by reason of the provision in section four of the act of 1850, or by reason of any provision in any other law of the United States.

The plaintiff's counsel insists that the referee erred in swearing Mrs. McKee as a witness in her own behalf, and permitting her to testify in the cause, for the reason that her co-defendant, John A. McKee, was her husband. I will remark, in the first place, that I do not think she

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should have been excluded on the score of public policy. There is express authority in the Revised Statutes for the examination of wives as witnesses against their husbands by creditors, in proceedings by insolvents, to obtain discharges from imprisonment or from their debts. The conservative authors of those statutes did not suspect that the examination of wives against their husbands in such proceedings, would destroy the peace or happiness of the families of insolvents. They innovated upon the old rule that excluded the wife from testifying as a witness against her husband; and it is presumed they had no fears that her admission in such proceedings would cause implacable discord in families. (See 5 *Seld.*, 157, for the old rule.) If it is safe or politic to permit wives to be witnesses in such proceedings, I am unable to perceive why it is not also safe and politic to allow them to be witnesses in actions to which they and their husbands are parties, especially when they have greater interests in the controversies than their husbands, and the adverse parties may be witnesses against them.

It cannot be denied but that section 399 of the Code is sufficiently comprehensive to authorize the wife to be a witness in her own behalf, and the husband in his own behalf, whether they be co-plaintiffs or co-defendants, or whether the action be brought by one against the other. I have not doubted at any time since this section was changed to its present form, but that the *real parties* to actions, when husband and wife, are competent witnesses either for the adverse parties or for themselves. The only exception contained in this section to parties being witnesses for themselves is, that a party shall not be a witness in his own behalf unless the person in interest on the other side is living, nor when the opposite party shall be the assignee, administrator, executor, or legal representative of a deceased person; and there is no prohibition in any part of the Code against the husband or wife being a

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witness in his or her own behalf, when joined as plaintiffs or defendants, or when the action is brought by one against the other. It seems to me if the legislature intended to exclude the husband or wife in any case, because he or she was husband or wife, they would have so declared; for they had previously enacted section 114 of the Code, in regard to suits being brought by and against husband and wife, and by one against the other. They must, therefore, have had the fact in mind, that husbands and wives were to be joined as parties to suits, and could sue each other, when they enacted that "a party to an action may be examined as a witness, at the instance of the adverse party, or of any one of several adverse parties" (Code, § 390); and also when they declared that "*a party to an action or proceeding may be examined as a witness in his own behalf, the same as any other witness.*" (Code, § 399.) I think the conclusion is irresistible, that the legislature intended to place husbands and wives, when parties to actions, on the same footing of other persons, as to being witnesses in their own behalf or for the adverse party; and that if such had not been the intention of the legislature, they would have excepted them from the operation of the general language of the sections above quoted. The innovation that makes any party to an action a competent witness for himself or his adversary is as great as that which trenches upon the rule that prohibited the husband and wife from being witnesses for or against each other. The legislature undoubtedly thought it was no more dangerous to permit wives to be witnesses, when parties to actions with their husbands, than to declare them *feme soles* in regard to the ownership and management of property. I think no greater evil will flow from husbands and wives being witnesses in their own suits, than arises from their suing and being sued with others, or suing each other; and I do not doubt but that the legislature intended to confer, and has conferred on them, the right that is

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secured to other persons, of establishing their cases when parties to actions, by their own testimony. It is undisputed that the plaintiff was a competent witness for himself in the case at bar; and I must say if the legislature has failed to provide a law that authorized Mrs. McKee to testify for herself in the action, they have not carried out the spirit of their acts for the "protection of the property of married women." If the law has not secured this privilege to Mrs. McKee, as against the plaintiff, then her rights are not protected, but are trenced upon by the opening of the mouth of her adversary, as a witness against her, while her own remains closed. Besides, if she was incompetent to testify in the cause, so was her husband.

I am so well convinced that section 399 of the code, as it now exists, authorizes husband and wives, when parties to actions, to be witnesses for themselves, I must hold that Mrs. McKee was properly admitted as a witness in her own behalf in this case, notwithstanding the very able special term opinions to the contrary, in *26 Barbour*, 612; *15 Howard's Practice Reports*, 165 and 169.

There is no other point in this case that calls for discussion. The judgment in the action should therefore be affirmed, with costs.

Decision accordingly.

NOTE.—Section 399 of the Code has been amended since the above opinion was written. (See *Laws of 1860*, and 2d ed. of *Howard's Code*, page 633.)

SUPREME COURT.

ELIZA C. HALL agt. LUCIEN AYER.

It is irregular to issue an execution against the body, before the execution against the property is returned.

The execution of the sheriff to indorse upon an execution the proper return before

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it is filed, is amendable *nunc pro tunc* after the filing; but he must pay the costs of the motion.

Where the parties agreed to settle by releasing claims against each other, and the plaintiff gave the defendant a consent that the judgment be satisfied on payment of costs, and it appeared that the judgment was entered up without costs, but the plaintiff had agreed with his attorney that his compensation should be \$200 out of the amount recovered.

Held, that the defendant was bound to pay what the attorney was entitled to under the agreement, \$200, as the terms of the settlement was equivalent to notice, and sufficient to put him on inquiry as to the amount of the costs. (So much of the case of *Haight agt. Holcomb*, 16 *How. Pr. R.*, 173, as limits the attorney's lien to the costs in the judgment, has been virtually overruled by the case of *Rooney agt. Second Av. R. R. Co.*, 18 *N. Y. R.*, 368.)

New York Special Term, October, 1859.

MOTION to set aside execution against the person, and to satisfy the judgment of record. The facts sufficiently appear in the opinion of the court.

INGRAHAM, Justice. It was irregular to issue an execution against the body before the execution against the property was returned. The execution appears to have been filed, but the sheriff omitted to indorse upon it the proper return. This error, however, is amendable, and as it is the fault of the sheriff rather than the attorney, he should be allowed to indorse the return *nunc pro tunc* on payment of the costs of the motion.

It is also urged as a ground for denying this motion upon the merits, that the settlement was in fraud of the attorney's claim for costs.

The parties agreed to settle by releasing claims against each other, and the plaintiff gave the defendant a consent that the judgment be satisfied on payment of costs. The judgment was entered up without costs, but the plaintiff had agreed with his attorney that his compensation should be \$200 out of the amount recovered. The defendant insists that as no costs were included in the judgment, he was not liable for anything, and asks that the judgment be satisfied.

In *Haight agt. Holcomb* (16 *How. Pr. R.*, 173) it was said

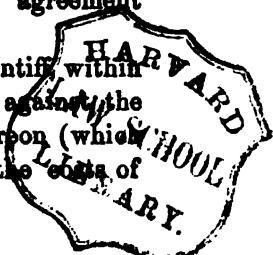
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that the attorney's lien only extended to such costs as appeared on the judgment roll, and did not embrace an amount which the attorney and his client had agreed upon as an additional compensation.

That case only referred to a judgment which contained the costs, and in which it was held that the attorney's lien for costs could not be taken away by a settlement of the client, even where no notice had been given of the attorney's claim. But so much of it as limited the attorney's lien to the costs in the judgment, has been virtually overruled by the court of appeals, in *Rooney* agt. *Second Avenue Railroad Company* (18 N. Y. R., 368), where it was held that in a case where the party had notice, the attorney had a lien not only for the taxable costs, but also for any portion of the damages which the party had stipulated the attorney should receive by way of compensation. Mr. Justice HARRIS says: "Where there has been an agreement for more or less than that sum (the taxable costs), the amount which by agreement he is to receive, will determine the extent of his lien." And Mr. Justice COMSTOCK says: "If there is a special agreement, that will take the place of the pre-existing statutory rates."

The plaintiff and his attorney here agreed on two hundred dollars as the compensation. The defendant settled the damages recovered in the judgment on condition of payment of the attorney's costs. This is equivalent to notice. The defendant should have ascertained what the attorney's costs were before settlement. Having agreed to pay them as a condition of the release, he is bound to pay what the attorney was entitled to under the agreement between him and his client.

This motion must be granted, unless the plaintiff, within five days, obtains a return to the execution against the goods, &c., of defendant, to be indorsed thereon (which the sheriff may do *nunc pro tunc*), and pay the costs of the motion, \$10.



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In case such return is made, the motion is granted on payment to the plaintiff's attorney of \$200.

SUPREME COURT.

CHARLES M. DURANT, receiver of HUGH DOWMING, agt.
HEMAN M. GARDNER, ROSWELL GREEN and others.

Where a complaint contains a *demand for judgment* upon hypothetical or alternative conclusions of law, at which it is supposed the court may arrive on the trial, such demand will be stricken out.

And where, in the complaint, the prayer for *general relief* is entirely inconsistent with the demand for judgment for a specified amount in an action for a money demand on contract, such prayer will be stricken out.

New York Special Term, May, 1860.

MOTION by defendants to strike out portions of the amended complaint.

BONNEY, Justice. The summons in this action is for a money demand on contract.

The original complaint stated facts supposed to constitute a cause of action, whether legal or equitable might be doubtful, and prayed judgment that defendants in one event be decreed to account and pay to plaintiff their proportions of certain sums of money claimed to be due; and that plaintiff have judgment against them for \$6,958, with interest and costs; and in another event, demanded judgment against the defendants, as trustees, for said sum of money with interest, and for general relief.

On the 21st of January last, an order was made on defendants' motion, that the complaint be stricken out for irregularity, in that it did not conform to the summons, with leave to plaintiff to serve an amended complaint.

The plaintiff has served an amended complaint, which, or portions of which, the defendants now move to strike out.

The plaintiff in this amended complaint, after stating his appointment as receiver of Downing, &c., alleges that

Dissenting opn. Gardner.

the defendants and Downing undertook to form and act as a manufacturing corporation, under the laws of this state, of which corporation Downing and defendants were named and acted as trustees; that such supposed corporation and trustees neglected to perform certain required acts necessary to the proper formation, or continued legal existence of their incorporation. That for the benefit of the company, and *at request of said trustees*, Downing advanced and paid various sums of money and assumed liabilities, in the aggregate amounting to \$6,958, which the company was liable to pay him, and which the defendants, by reason of their neglect of duty as such trustees, became liable to pay; and that the right to and to collect the same has passed to the plaintiff as receiver.

The complaint further alleges that if the intended corporation was not legally formed, the defendants and Downing remained an unincorporated joint stock company, and as such (in that case, I suppose is intended) the defendants are liable to pay said indebtedness to Downing; and plaintiff prays judgment that in case said corporation be adjudged not to have been legally formed, the defendants be adjudged to pay to plaintiff, and that he have judgment against them for said \$6,958, and interest. But if it be adjudged that said corporation was duly formed, then that plaintiff have judgment for said sum of money and interest, against the defendants, as trustees, for their alleged defaults, neglects and omissions of duty.

The conclusions of law upon which the plaintiff demands judgment against the defendants, are somewhat inartificially and probably unnecessarily stated in the complaint. It would have been sufficient, and I think better pleading to have plainly alleged the facts upon which plaintiff relies, and demanded judgment for the amount of money claimed to be recovered; omitting any statement of supposed legal principles upon which he relies to maintain his claim.

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But the plaintiff has, I think, intended to allege that upon the facts stated he has a legal claim against the defendants for the money demanded, on an implied contract arising upon alleged irregularities in the supposed formation of the intended corporation, or neglect in the subsequent performance of their duties as trustees of such corporation, by reason of which the defendants, personally instead of the corporation, have become his debtors for the money by him advanced, &c., which in my opinion is a claim for a money demand on contract; and if the plaintiff at the trial shall fail to make out a contract, express or implied, he must fail in the action.

I do not think the plaintiff has in this amended complaint stated, or intended to state, two classes or forms of action, or indeed two counts. He has stated unnecessarily, I think, two supposed legal grounds upon which he seeks to maintain his action; but such statement is *not uniting two inconsistent causes of action or claim* which requires one to be stricken out from the complaint.

The defendant moves to strike out three specified sections or portions of the amended complaint. The first mentioned section is a statement of facts which appears to be unobjectionable, if not absolutely necessary to be stated.

The second section moved to be stricken out is a demand for judgment upon hypothetical or alternative conclusions of law, at which it is supposed the court may arrive on the trial; and this appears to me not only unnecessary, but improper to be inserted in the complaint.

The third section is a prayer for general relief, entirely inconsistent with the demand for judgment for a specified amount in an action for a money demand on contract, and therefore improper, even if harmless.

The motion is granted to strike out the second and third sections of the amended complaint specified in the notice. As to other matters denied; no costs to either party.

In the Matter of admission of Graduates, &c.

SUPREME COURT.

IN THE MATTER OF THE ADMISSION OF THE GRADUATES OF THE LAW DEPARTMENT OF THE UNIVERSITY OF THE CITY OF NEW YORK, TO PRACTICE AS ATTORNEYS AND COUNSELLORS OF THIS COURT.

The provision of the act entitled "An act with reference to the University of the city of New York," passed April 6, 1860, which provides that "any graduate of the law department shall be admitted to practice as attorney and counsellor at law, in all the courts of the state," upon certain prescribed examination and recommendation of the faculty of law of the University, was passed without authority or power, and in violation of the constitution.

It was the evident intention of the framers of the constitution (Art. 7, § 8,) to leave or vest in this court the right of appointing its own attorneys and counsellors, and the right of ascertaining and passing upon the requisite qualifications of applicants, by and through its own committee of examination.

New York, General Term, May, 1860.

Present, SUTHERLAND, MULLIN and LEONARD, Justices.

By the court—SUTHERLAND, Justice. A motion is made in behalf of twenty-two young gentlemen, graduates of the law department of the University of the city of New York, for their admission to practice as attorneys and counsellors of this court, under a recent act of the legislature of this state. (*Chap. 187, passed April 6, 1860.*)

The act is entitled "An act with reference to the University of the city of New York."

The first section of the act is as follows: "The faculty of law of the University of the city of New York, are hereby constituted a committee, upon whose examination and recommendation, as evinced by the degree of bachelor of laws, conferred upon their recommendation by the council of the University, any graduate of the law department shall be admitted to practice as attorney and counsellor at law in all the courts of the state; but no diploma shall be sufficient for such admission, which shall be given

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for a period of attendance upon said law department less than three terms of twelve weeks each, or than two terms of twelve weeks each, with one year's study of the law elsewhere."

This motion is made on the certificates of the individuals composing the faculty of law of the said University, certifying that these twenty-two young gentlemen "have attended the law department of the said University for two terms of twelve weeks each, and have pursued the study of law one year elsewhere;" and further certifying, that upon their recommendation, after a thorough and critical examination by them, the council of the University had conferred upon these young gentlemen the degree of bachelor of laws.

We are inclined to think, that the diplomas themselves should have been produced, as the best evidence of their having been conferred on the applicants; but as the certificate leaves no room for doubt, that the diplomas have been conferred on the applicants in accordance with the act, we should at once direct an order for their admission to be entered on the production of their diplomas, and filing the certificate, if there were not other and more serious objections to their admission under this act.

After a careful examination of the question, we think the legislature had no constitutional right or power to pass the act; and thus take away from this court the right and power which it has heretofore exercised, of ascertaining and determining for itself and under its own rules and regulations, whether the applicants are of the class or description of persons, by the constitution entitled to admission, and have the requisite constitutional qualifications, of learning, and ability, and moral character.

By section 8, of article 6, of the constitution, "any male citizen of the age of twenty-one years, of good moral character, and who possesses the requisite qualifications of learning and ability, shall be entitled to admission to practice in all the courts of this state."

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We think the act in question conflicts with this provision of the constitution in more than one respect.

1. The constitution in effect declares, that the applicant to be entitled to admission must be a male citizen, and of the age of twenty-one years.

The act in effect declares, that any graduate of the law department of the University, irrespective of sex, age or citizenship, upon whom the diploma has been conferred under the circumstances mentioned in the act, shall be admitted to practice, &c. (See *McKean* agt. *Devries*, 3 *Barb.*, 196.)

If the act is constitutional and valid, on applications for admission under it, it would appear to leave for the court a ministerial, formal duty only, and which could as well be performed by the clerk or the crier, as by the court.

The act would appear to make the diploma conferred by the council of the University conclusive evidence to the court, not only, that the applicant is possessed of the requisite qualifications of learning, ability, and good moral character, but also that the applicant is of the age of twenty-one years, and a male citizen; thus taking from the court all right of inquiry into any of these circumstances, and all judicial discretion and control as to or over the applicant's admission.

If constitutional, the act is in effect a legislative mandamus to the court to *admit*, on the presentation of the diploma, and satisfactory evidence that it had been given for a period of attendance upon the law department of the University, or of such attendance with one year's study of the law elsewhere, not less than that specified in the act.

This mere ministerial duty, which the act would appear to leave in the court, and which this motion assumes the court should perform in the usual way, by directing an order for the admission of the applicants to be entered, and by granting them the usual diplomas or licenses to practice, would appear to be not only useless, but incon-

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sistent—useless, because, if the diploma of the council of the University is, or should be, sufficient evidence of the applicants' constitutional qualifications to authorize the court to grant its license, then the diploma of the council of the University is, or should be, sufficient evidence of the applicants' qualifications and right to practice, without any other or further diploma from the court—and inconsistent; because the license or diploma of the court would be, or ought to be, substantially a certificate, that the applicant has the constitutional qualifications and right to practice; but how can the court give this certificate on the mere certificate or diploma of the council of the University, which certificate or diploma of the council has been conferred on the mere certificate or recommendation of the faculty of law of the University, a body constituted or composed no doubt of individuals of great learning and discretion, but not appointed or appointable by, or deriving any authority from the court, and in no way controllable by, or responsible to the court.

Indeed, if the legislature had the constitutional right and power to constitute the faculty of law of the University a committee to ascertain, determine, and certify, to the constitutional qualifications of the applicants, and intended to do so by this act, why was the act so worded as to require or imply that an application for *admission* should be made to the court, and that the court should also grant a diploma or license? If the main purpose of the act was authorized by the constitution, why was the mere useless ceremony of an application for, and of the court's granting a license retained? What higher authority, or better evidence of his right to practice on taking the oath of office, could the applicant have or require, than the constitution, the act of the legislature, and the diploma specified in the act, and conferred on him, under the circumstances specified in the act? Is not the application for admission to, and the granting of a license by the court,

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which this motion assumes to be required, and which probably is required or implied by the act, inconsistent with the main purpose of the act?

2. We are inclined to think, that the proviso or condition of the act, which declares, that no diploma (of the council of the University) shall be sufficient for such admission, unless given for an attendance upon the law department of the University, with or without one year's study of the law elsewhere, for not less than certain terms or periods specified in the act, brings the act in conflict with the constitutional provision, and may in effect be considered as nullifying the act.

The constitution prescribes no term or period of clerkship, or of study; or standard of learning or ability; upon, or by which the applicant is to be examined, admitted, or rejected. On the contrary, it is plain, that the constitution intended to regulate and limit the power which the court then had over the admission of attorneys, &c., and to abolish the right and practice of requiring by certain prescribed rules and regulations a certain period of clerkship, or study of the law, as a preliminary or condition to the right of an examination for admission. The constitution says, "*any* male citizen of the age of twenty-one years, of good moral character, &c., *shall* be entitled," &c. If the applicant for admission is a citizen, and of the age and sex mentioned in the constitutional provision, the constitution in effect appoints him to the office of attorney, &c., upon his character, and the extent and sufficiency of his learning and ability, being ascertained and passed upon favorably. The constitutional provision would certainly appear to be inconsistent with any right of the legislature or of this court to impose upon the candidate for admission, the terms or conditions of attendance upon the law department of the University, specified in the act in question, or indeed, any prescribed course or term of study or preparation at the University, or elsewhere, as a condition of examination.

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The act declares that the diploma conferred by the council of the University, *shall not* be sufficient evidence for the applicant's admission, unless given for a period of attendance upon the law department, &c., of not less than that specified in the act. Then conceding that the legislature had the constitutional right to declare, that the diploma of the council of the University should be sufficient evidence of the qualifications and right to admission of the law students of the University, why does not this unauthorized condition of a certain period of attendance upon its law department, imposed by the statute, whether for the benefit of the students, the profession, the professors, or the University, it is unnecessary now to inquire, completely nullify the act? The act would appear to present an instance of a legislative *felo de se*.

It is certainly quite clear if this proviso or condition does not destroy the act, and the legislature had the right to declare that the diplomas conferred by the council of the University, should be sufficient evidence, &c., that the applicants should be admitted on the presentation of their diplomas alone, and without requiring of them any evidence of a certain period of attendance upon the law department of the University, or of the study of the law elsewhere.

3. But the important question raised by this motion is, whether the convention which framed the constitution, did not intend, by the provision before quoted, to leave or vest in this court, the appointment of its attorneys and counsellors, and the strictly discretionary and *quasi* judicial power and corresponding duty, of ascertaining and passing upon the constitutional qualifications required for appointment to those offices implied in the right of appointment? This is the important question, because the legislature, if it has the right to confer this discretionary power on the faculty of law, or council of the University of New York, has the right to confer it on any committee, tribunal, per-

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son or officer; and the legislature may not always exercise this right as discreetly as they have by the act in question.

We are inclined to think, from the express words of the provision of the constitution, that the intention of its framers was to leave or vest in this court the right of appointing its own attorneys and counsellors, and the right of ascertaining and passing upon the requisite qualifications of applicants, by and through its own committee of examination.

The words of the constitution are, "any male citizen of the age of twenty-one years, &c., of good moral character, and who possesses the requisite qualifications, &c., shall be entitled to *admission*, &c."

Shall be entitled to admission by whom? By whom but the court? What does the word *admit*, or do the words *to admit* mean? To grant leave, to enter into. Does not the right of granting leave, imply the right of refusal of leave; and do not the words of the constitution plainly imply that the court shall have this right; and does not this right or power of granting or refusing leave, imply, in the absence of any other express provision of the constitution on the subject, the right and duty of ascertaining and passing upon the qualifications of applicants for admission? If the words of the constitution had been, "shall be entitled to admission" *by the court or courts*, there could not have been a doubt, that the provision was intended to leave with the court, subject to the limitations or restrictions implied by the provision, the whole subject of the admission of its attorneys and counsellors, and the exclusive power and duty of passing upon their qualifications, and right of admission.

Suppose the constitution declared, that any stenographic reporter of the requisite qualifications, &c., should be entitled to enter the halls of the legislature for the purpose of reporting its proceedings. Would not such a declaration, or provision, imply and vest in the legislature the

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quasi judicial power and discretion of passing upon the qualifications of every reporter who applied for admission, or leave to enter for such purpose?

A brief reference to the circumstances under which the provision in question was inserted in the constitution, would appear to leave no room to doubt, that it was the intention to leave with the courts the power, discretion, and duty in question.

The constitution of 1777, (Section 27,) gave the appointment of attorneys, &c., to the courts, without any limitation. Under it, the court could admit minors or aliens; the court having and exercising indeed full discretion and power over the whole subject. (1 *John.*, 528; 4 *John.*, 192.)

The constitution of 1822 does not allude to the subject, nor indeed to the power or jurisdiction of the Supreme Court; simply speaking of it as a court already in existence. (Art. 5, Sec. 4.)

By the Revised Statutes, attorneys, &c., were defined to be, not only public officers, but judicial officers; and in the absence of any provision made for their appointment in the constitution of 1822, the Revised Statutes declared, that they should be appointed and licensed to practice by the several courts in which they intended to practice, and that the supreme court should prescribe the rules and regulations under which they should be appointed and licensed in that court. Previous to the Revised Statutes, they were considered and had been judicially held to be, not only officers of the court but public officers. (1 *Hopkins Ch. R.*, 6; 2 *Crown*, 13.) Section 3 of article 6, of the constitution of 1846, declares and confirms the general jurisdiction of this court; and section 5 of the same article must operate, and was probably intended to operate, as a limitation of the powers of the legislature over its jurisdiction and proceedings; then follows in connection, the provision in section 8 of the same article, in relation

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to the admission of attorneys and counsellors to practice. This provision of the constitution of 1846, must be presumed to have been adopted with knowledge of this power of the court, and of the rules and regulations which had been prescribed by it, and then in force under which it was exercised.

This provision of the constitution of 1846, should be looked upon as a mere limitation or regulation of a recognized and conceded power of the courts; and the principle which should control its construction is: that the mere limitation or regulation of a political or governmental power or trust by the sovereign power (for the convention which framed the constitution represented, and the people who ratified it were, and are the sovereign power, and not the legislature) should be considered, as leaving and confirming the power as thus limited or regulated in the tribunal or officer exercising and authorized to exercise such power, in the absence of any express declaration or provision of the sovereign power to the contrary, or inconsistent with such construction.

To adopt this principle in the construction of this provision of the constitution, would be merely recognizing and applying in its construction, the common law principle in the construction of a statute altering or modifying a common law rule, or impairing a recognized right, viz: that such statute is not to be deemed as intended to alter or modify the common law rule, or impair the right, any further than the express words of the statute demand.

If the legislature have the power assumed by passing the act in question, it must be under the general grant of legislative power in the constitution, or under the provision (*Article 10, Section 2.*) which expressly gives the legislature power to provide for the election or appointment of all officers, whose election or appointment is not provided for by the constitution, and all officers whose offices should thereafter be created by law.

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When the constitution grants a power, or enjoins the performance of a duty, it is useless and nugatory for the legislature to do the same thing; for the constitution is supreme. The constitution and the act in question, both say, that certain applicants shall be admitted to practice as attorneys, &c. The constitution leaves nothing to be ascertained and passed upon judicially, but the qualifications of the applicants. It is very clear, therefore, that the act can have, and was not intended to have any other or further force or effect, than to confer on the faculty of law of the University the discretionary or judicial power of ascertaining and passing upon the qualifications of the applicants, and to make the diplomas of the council of the University, evidence of the sufficiency of their qualifications, instead of the license or diploma of the court.

Now it will hardly be claimed, that the legislature had the right to confer this power, under the general grant of the power of legislation. The general provision before adverted to (*Article 10, Section 2.*) giving express power to the legislature, to provide for the appointment or election of all officers whose appointment or election is not provided by the constitution, would go to show, that the right to pass the act could not be claimed under the general grant of legislative power. By the very terms of the provision in Article 10, § 2, it does not give the right, if the appointment of attorneys, &c., is provided for in section 8 of article 6.

We have given our reasons for thinking that the last mentioned section construed in connection with sections 3 and 5 of the same article, declaring and confirming the general jurisdiction of the court, and limiting the powers of the legislature over its jurisdiction and proceedings, do give to, or confirm in the court, the right of appointment and the exclusive power of ascertaining through a committee of its own, or otherwise, the qualifications of all applicants.

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If we are right in our views of the question, it follows that the legislature had no power to pass the act in question.

If the power is in the court, it is a public trust; and the court has no right to surrender it, or the legislature to assume it, or confer it on any committee, person, or officer, constituted or appointed by it.

In this day of easy legislation, and of omnipotent majorities, it is the duty of this court to ward off all unauthorized attacks by the legislature on the legitimate powers or jurisdiction of the court.

We do not say that we have not the *power* to consider the diplomas conferred on the applicants under the act sufficient evidence of their qualifications, and to admit them on furnishing the evidence of citizenship, age, &c., required by the second rule of the court; or if thus admitted and licensed by the court, that their right to practice could be questioned on the ground of the unconstitutionality of the act.

An imperfect or improper exercise of a power of appointment, may not, in all cases, affect the appointee's title.

But we do intend to say, that, in our opinion, the legislature had no right to declare that the diplomas conferred under the act *shall* be sufficient evidence of the requisite learning and ability of the applicants, and *shall* entitle them to admission, either with or without the evidence of moral character, citizenship, and age, required by the second rule of the court; or with, or without evidence of their attendance in the University, and of their study of the law elsewhere, for the period or terms mentioned in the act; and that, in our judgment, they ought not to be admitted without submitting to the usual examination; which they, or such of them as desire it, can have at an early day, by complying with the second rule of the court.

Gardner agt. Ryerson.

SUPREME COURT.

ELIZABETH GARDNER agt. AMANDA RYERSON, adm'x, &c., and another.

Where in an action to recover the possession of personal property, by a married woman, the question of ownership, which was the principal issue on the trial, was submitted to the jury, by both parties, on very slight evidence, *Held*, the cause having been summed up by counsel and fairly submitted, without exception, by the judge, that the court could not set aside the verdict, without invading the province of the jury—it being a question exclusively for the jury. *Also, held*, that there could be no surprise upon the defendants, by the plaintiff's counsel referring to the affidavit of the plaintiff on which the action was commenced, to show and prove ownership of the property, where the defendants had previously introduced and read a portion of the affidavit on the trial to prove the value of the property. They could not read one part of the affidavit and exclude another.

Kings Special Term, February, 1860.

MOTION by defendants for a new trial.

An inquest was taken in the cause by the defendants before Mr. Justice STRONG, who held that the admission contained in the affidavit of the plaintiff (commencing the action) served with the other papers in the cause, was sufficient, and required no other proof of value, and assessed the value of the property at the amount stated in said affidavit. On the trial, subsequently, before Mr. Justice EMOTT, no proof was given or offered as to the value of the property. The jury were directed to assess it at the amount stated in the affidavit, which they did. The plaintiff's counsel referred, in summing up, to this affidavit, to show that the plaintiff was the owner of the property. This reference to the affidavit to prove ownership of the property in the plaintiff, was claimed by defendants as a surprise upon them. The other facts will sufficiently appear in the opinion of the court.

ABM. LOTT AND WM. Z. LARNED, for motion.

WARING AND SIDELL, opposed.

Gardner agt. Ryerson.

BROWN, Justice. This action was brought to recover the possession of certain personal property claimed by the plaintiff, who is a married woman and wife of William Gardner, as the owner thereof, against Jerome Ryerson, late sheriff of the county of Kings. He died pending the action, and it has been continued against the defendants, his personal representatives. The sheriff justified the taking under an execution issued upon a judgment recovered in the superior court of the city of New York, in favor of Henry E. Inslay against William Gardner, the husband of the plaintiff. The cause was tried at the October circuit, 1859, for the county of Kings, and a verdict rendered in favor of the plaintiff.

The only question in controversy beyond the value of the property, was the title of the plaintiff, which was alleged to be colorable and fraudulent as against the creditors of the husband. The proof showed that the goods were taken by the sheriff from the possession of the plaintiff, in Williamsburgh, with this qualification: that the plaintiff and her husband lived together in the house in Williamsburgh, from whence the goods were taken; he at the same time doing business in New York. The evidence of the right of property was slight on both sides. There was, however, some proof in favor of the plaintiff's right to the property, while, on the part of the defendants, there was little or no proof of property in the husband, William Gardner, except the legal inference that the property of the wife, or in her possession, in the absence of proof to the contrary, is to be deemed the property of the husband. The question at issue was one, however, exclusively for the jury to decide. Both sides submitted the case to them upon slight evidence. There was evidence however. The question was fully summed up by the counsel and fairly submitted, without exception, by the court. I do not think, under the circumstances, that I could set aside the verdict without invading the province of the jury.

Ashley, agt. Marshall.

It was urged upon the motion for the new trial, that the defendants were surprised by the contents of the affidavit made by the plaintiff to commence the action, and the use made of it by the plaintiff's counsel. This affidavit was read to the jury by the defendants to show the value of the goods taken, and the plaintiff's counsel referred, in summing up, to some of its expressions to show that the plaintiff was the owner of the property described in it. The defendants could not read one part of it and exclude another. By introducing it in evidence, they put it in the power of the plaintiff to read it all, because it must all be taken together, being the declaration under oath of the plaintiff. Nor can the defendants say it was a surprise upon them. They surely cannot be allowed to urge their own acts in the introduction of evidence, as a ground of surprise upon a motion for a new trial.

Upon the whole, I am brought to the conclusion that the motion for a new trial must be denied, with costs of the motion to the plaintiff.

SUPREME COURT.

ASHLEY agt. MARSHALL.

Where the plaintiff commenced a common law action to recover *damages* against the defendant, for forcibly entering the premises of the plaintiff and taking possession of personal property, (furniture,) and at the same time procured an injunction (quere action to get an injunction in,) to restrain the defendant from taking possession of, selling, removing, or in any manner interfering with the property, (and the plaintiff as soon as he got the injunction took possession and sold all the property at auction.) And the defendant, in his answer, after denying all the material allegations of the complaint, set up authority to take the property by reason of default made in the payment of a personal mortgage; and upon the trial of the issues, the referee found that most of the property belonged to the plaintiff, but allowed him nothing for the property, as he had recovered possession, but allowed him \$25, for the intrusion of the defendant upon

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the premises; and allowed the defendant a judgment for \$188.87 against the plaintiff for the conversion of the defendant's share of the property, *Held*, that although it appeared that the plaintiff's share of the property over and above what the defendant was entitled to, would have been sufficient in an action for claim and delivery to carry costs; yet, having prosecuted an action for damages, in which his adversary was in effect the successful party, *costs* must follow for the defendant as a matter of course.

New York General Term, November 1859.

Present, ROOSEVELT, CLERKE and SUTHERLAND, Justices.

APPEAL from a judgment at special term. The facts will sufficiently appear in the opinion of the court.

By the court—CLERKE, Justice. This action was commenced to recover damages against the defendant, for forcibly entering the premises of the plaintiff, and taking possession of the plaintiff's personal property, situated there, consisting, principally, of furniture. On the commencement of the action the plaintiff obtained an injunction to restrain the defendant from taking possession of, selling, removing, or, in any manner interfering with this personal property. The defendant, in his answer, claims this property by virtue of a mortgage, executed to him on the 13th November, 1855, by one Steckel, who was then in possession of the premises, and of the personal property in question. He also sets up, that in pursuance of the authority contained in the mortgage, he had a right to take possession of the personal property; but that after he had taken possession of it, and when he was about to remove and dispose of it, he was prevented from doing so by reason of the injunction, and, consequently, lost the debt, and suffered damage to the amount of his claim against Steckel.

He also denies every material allegation in the complaint.

It appears from the testimony before the referee, to whom the issues were referred, that at the commencement of the action most of the furniture mentioned in the com-

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plaint belonged to the plaintiff; that he was the assignee of an unexpired term of a leasehold interest in the premises, which was used as a hotel; that Steckel was in possession by permission of one Doolittle, whom the plaintiff allowed to occupy it; that Steckel kept it, consequently, as landlord from the first of May, 1855, until the month of May, 1856, and that having purchased furniture for the use of the hotel, from the defendant, Marshall, he gave the latter the mortgage above mentioned, on all the furniture there, including the articles which he had purchased from Marshall.

The mortgage having become forfeited, Marshall went to the hotel, took possession of all the furniture, and forcibly nailed up the doors of the rooms in which it was contained, and caused it to be advertised for sale. The plaintiff, however, as soon as he obtained the injunction, took possession of the furniture, and sold it all at auction. The referee, of course, allowed nothing to the plaintiff for his furniture, as he had already recovered possession of it, but allowed him \$25 for the intrusion of Marshall into the hotel; and he gave to the latter a judgment for \$138.87, with interest, against the plaintiff, as damages, on account of the conversion by the plaintiff of Marshall's share of the furniture.

If the defendant had set up in his answer a claim for this portion of the furniture, there could be no doubt that the referee would have been justified in allowing him this amount, or whatever it was worth. But, was this necessary? The plaintiff claimed the whole, and the defendant claimed the whole, and in claiming the whole, he, of course, claimed the part to which the referee found he was entitled.

No separate claim or counter-claim for a part seems to me, therefore, necessary. Both parties claimed too much; the plaintiff failed to recover what he demanded, and having obtained possession of the whole and sold it, he

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was clearly accountable to the defendant for the value of that portion of it which belonged to the latter. If the plaintiff claimed only as much as it was proved he was entitled to, and the defendant at the trial endeavored to prove that the plaintiff, during the same transaction, took possession and disposed of other property not included in the complaint, belonging to defendant, it would not be proper to allow such a defence without a formal counter-claim set up in the answer. But, in claiming the whole, he does in effect set up a counterclaim to the part which he proved belonged to him. It is a claim, counter or contrary to the claim of the plaintiff, who demanded the whole but was only entitled to a part, the other part belonging to the defendant.

As to the mere claim for damages arising from the injunction, it would not have been proper for the referee to have passed upon them. Nor does he appear to have done so. He considers that the defendant had established his right to a portion of the property in question, and gave him a judgment accordingly.

It seems to me, that the plaintiff, who had a good cause of action for an amount exceeding the amount that the defendant proved himself entitled to, should be compelled to pay the whole costs of the action to the defendant. If the defendant had kept possession of the whole and sold it, the plaintiff's share of the proceeds over and above what the defendant was entitled to, would have been sufficient to carry costs. But, from the form of the action, and the mode of procedure which the plaintiff has adopted, costs must, I think, be awarded to the defendant as the successful party. This is an ordinary common law action for damages; to be sure, an injunction is prayed for; but this, even if entirely proper to grant it under the circumstances disclosed in the complaint, does not make it an equity suit. I regard the whole procedure of the plaintiff anomalous and unfortunate. It was totally unnecessary

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for him to have commenced the action in the form which he selected. If he commenced an action for the claim and delivery of the goods under chapter 2 of the Code, and the sheriff delivered them to him under the ordinary process for the recovery of specific personal property, and if he established his claim at the trial, still he would be entitled to the costs of the action, although he had obtained possession of the property. And this would have been quite as effectual a remedy, to say the least, as an injunction. Not having done this, but having prosecuted an action for damages, in which his adversary is, in effect, the successful party, costs follow for the defendant, as a matter of course.

The judgment should be affirmed, but without cost of the appeal.

SUPREME COURT.

THE UNION BANK agt. JACOB H. MOTT and GARRETT S. MOTT.

An amendment to the *complaint* allowed, by the court, during the trial before a referee, so as to include claims made by the plaintiff *as assignee*, with those made in its own right, by the original complaint.

Where judgment by default had been entered against one of the defendants, and subsequently opened to allow the defendant to come in and defend on terms, one of which was that the judgment should stand as security, *held*, that the defendants were not entitled, as one of the terms of amendment, to have such judgment *set aside*. It could stand, however, only as security for any claim which might be recovered under the *original complaint*.

But where the *bail* given by the defendants, under an order of arrest, was very large, and it appeared that the amount recoverable under the original complaint was comparatively small; and upon the facts presented on the motion for amendment it was doubtful if an order of arrest would have been granted; the undertaking and bail were *discharged*, without prejudice to a new application for arrest under the amended complaint.

The order of *reference* was directed to stand, as a number of days had been spent in taking testimony, which would be applicable to the case as amended, and no objections being made to the referee.

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Where the court on granting such amendment can see that no *demurrer* would lie unless upon the ground that the complaint does not state facts sufficient to constitute a cause of action, which can be raised as well *upon the trial* as by demurrer, and where the answers already in put the plaintiff to the proof of the whole case, it will refuse to allow the defendants to demur or answer *as such*, as terms of the amendment.

New York Special Term, May, 1860.

THIS action was commenced in March, 1859; the complaint charged the defendants with an indebtedness of \$141,586, for moneys fraudulently obtained from plaintiff between the first day of January, 1849, and the 16th day of March, 1858, by means of overdrafts and false entries in the books of account of the plaintiff, in collusion and with the aid of a book keeper in the employ of the plaintiff during that time.

A judgment was obtained by default against Garrett S.; the default was afterwards opened on terms but the judgment ordered to stand as security. Both defendants, by separate answers, denied the complaint, and set up the statute of limitations. After answer, the defendants were arrested and held to bail in the sum of \$142,000.

The cause was by consent referred, and, on the hearing before the referee, the evidence given covered the whole period stated in the complaint, from which it appeared that the plaintiff was an institution organized under the general banking law, in December, 1852, and commenced business January 1, 1853; that the institution known as the Union Bank, existing before the last date, was chartered in 1811, by the name of the president, directors and company of the Union Bank of the city of New York, and that said charter expired, and said bank ceased to exist on the last day of December, 1852, that all the claims against the defendants but \$1,000 occurred previous to 1853, and were held by the plaintiff, as assignee.

Upon the close of the proof, it was insisted that under the complaint the plaintiff was not entitled to recover for

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any claim accruing prior to 1853. The plaintiff claimed that the referee should conform the pleadings to the facts proved, but he declined.

The plaintiff then moved before the referee for leave to amend the complaint, by inserting another count for the claim accruing prior to 1853, as assignee. This motion the referee granted. The defendants obtained an order for the plaintiff to show cause why the said order of said referee should not be vacated; and after hearing, said order was set aside, with liberty to plaintiff to apply to the court by motion for leave to amend; which is the motion now under consideration.

S. A. Foot, for plaintiff.

D. D. FIELD, for defendant, Garrett S. Mott.

C. GANUN, for defendant, Jacob H. Mott.

JAMES, Justice. The only questions properly before me for consideration, are whether the amendment asked for should be allowed, and if so, upon what terms and conditions. As I understand the Code, it was intended to give a party every facility of amendment consistent with a proper regard for the rights of the other party to the action. It conferred upon parties or the court, the power of amendment in every stage of the action. Section 172 provides for amendments of course, before trial; sections 169 and 170 provide for amendments by the court during the trial; which power is also conferred upon referees by section 272; and section 173 confers upon the court at any stage of the action, in furtherance of justice, and on such terms as may be proper, the power to allow an amendment of any pleading, process or proceeding, by adding or striking out the name of any party, by correcting a mistake in the name of a party, or a mistake in any other respect, or by inserting other allegations material to the case, or when the amendment does not change substantially

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the claim or defence, by conforming the pleading or proceeding to the facts proved.

The amendment asked in this case is to insert other allegations material to the case. The case, as stated in the original complaint, is to recover for money fraudulently obtained from the plaintiff, between January, 1849, and March, 1858. It appears that the plaintiff is a corporation created in December, 1852, which succeeded to all the property, rights, &c., of another institution of nearly the same name, the charter of which expired on the last day of December, 1852, the plaintiff continuing the same business, in the same place, with the same clerks, &c., as the old bank. All the indebtedness accruing before 1853, was to the old bank instead of to the new, and belong to the plaintiff by assignment; hence the amendment proposed is necessary to show plaintiff's title to that part of the demand. It comes clearly within both the letter and spirit of section 173 of the Code. Of the power of the court to grant such amendment, I have no doubt.

Whether the claim, alleged to be due from the defendants to the above bank, and assigned, is capable of assignment, it is not now necessary to decide—the full facts upon that point were not presented for my consideration. For the purposes of this motion I assume that it was, and therefore the claims held as assignee, and those due to plaintiff in its own right could be joined in one action, and it would therefore be in furtherance of justice to allow this amendment to be made, rather than turn the plaintiff over to another action.

The defendants insist that if the motion is granted, it should be only on condition that the judgment obtained by default, and the order of reference be vacated, the bail given on the arrest discharged, and the defendants permitted to demur or to answer anew, the amended complaint, and that plaintiff pay all costs accruing since the service of the original complaint, with costs of this motion.

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I do not understand that allowing this amendment enlarges the judgment obtained by default, or extends it as a security for any matter which could not be recovered under the complaint upon which this judgment was entered. Such judgment can only stand as security for such subsequent judgment as may be obtained for the consideration stated in the original complaint. To that extent, I can see no impropriety or injustice in allowing it to stand.

The bail, in this case, is very large; and the amount recoverable under the original complaint comparatively small. To continue the bail at its present amount, would be oppressive and unjust. Upon the facts, as presented on this motion, it is doubtful if an order of arrest would have been granted. I shall, therefore, direct the undertaking and the bail to be discharged, but without prejudice to any new application for an order of arrest, under the amended complaint.

I can see no reason for vacating the order of reference. Twenty-two days have already been spent in taking testimony, all of which is applicable to the case, if amended, and will have to be gone over again, if the order of reference be discharged. In fact, the whole trial, as far as it has proceeded, was upon the same questions as will arise under the amended complaint; and as no objection is made to the referee, the order should stand, and the testimony already taken made applicable to the pleadings as amended.

It was not made to appear why or wherein a demurrer or a new answer would be essential to protect the rights of the defendants, in case the motion to amend was granted. The original complaint and the amendment proposed being presented, the court can see that no demurrer would lie, unless upon the ground that the complaint did not state facts sufficient to constitute a cause of action; and that question can be raised as well upon the trial as by demurrer. (*Code*, § 148.) And, in the absence of cause, the answers already in, as they put the plaintiff to the proof

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of the whole case, and interpose the statutory bar, may be extended to the amended complaint, without injustice to the defendants.

Upon such amendment being made, the parties will be prepared to proceed in the trial of the cause before the referee, at the place where they left off before this motion was made.

The motion to amend is granted, upon the foregoing terms and conditions, and on plaintiff's paying the attorneys of each party \$10, costs of this motion.

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NEW YORK SUPERIOR COURT.

GEORGE B. ROGERS, and others agt. CHARLES R. DEGAN,
and others.

Under § 309 of the Code, an *extra allowance of costs* may be ordered, upon the dismissal of the complaint by default, upon proof of service of notice of trial of issues of law.

Special Term, May, 1860.

MOTION for an extra allowance of costs.

ROBERTSON, Justice. The motion in this case is for an allowance, under § 309, upon the dismissal of the complaint by default, upon proof of service of notice of trial of issues of law, when the cause was reached in its order on the calendar; and the question whether an allowance can be made, must turn upon that other, whether such judgment by default is a trial within the meaning of that section. It is very evident that the allowance is not given as a trial fee alone, or counsel fee for trying the cause, (*McQuade vs. N. Y. & Erie R. R.*, 5 *Duer R.*, 616,) because it is the difficult and extraordinary character of the case, not of the trial, which determines the right to the

Rogers agt. Dagan.

allowance; the mere trial alone forms by itself a contingency on which the right of allowance depends, because sec. 322 excludes it upon a settlement before judgment, whereas, after a trial, costs follow, to be included in the judgment. The only remaining question is solved by the Code; and here I do not think the definition in sec. 252 is strictly applicable, as there can hardly be said to be a judicial examination when the default of a party is taken, but in regard to costs and indemnity of expense, I think the term has a wider meaning than this, being a modified continuation of a fee bill, in which trial included every mode of disposing of issues in a cause. In this sense it is used in § 307 of the Code, where under the fourth subdivision it has been held that the word trial, as applied to issues of fact, included judgments by default, (*Dodd agt. Curry*, 4 *How.*, 13), and it certainly must include similar judgments in issues of law mentioned in the same subdivision, and such was the view undoubtedly taken in *Lawrence agt. Davis* (7 *How. Pr. R.*, 354). The fact that no evidence is taken or other proceedings on a trial is immaterial. (*Shannon agt. Brower*, 2 *Abb.* 377.) The only effect of want of litigation on the trial would be to reduce the amount of counsel fee, and extra allowance, not the right to it altogether.

I think this is a proper case for an allowance of five per cent on the amount claimed.

Cox agt. Platt.

SUPREME COURT.

**HENRY H. COX and WILLIAM WRIGHT agt. WILLIAM PLATT,
JAMES HOLROYD and CLARK A. BROWN.**

An *assignment* for the benefit of creditors, preferring *individual debts*, known to be such, over partnership debts, payable out of the partnership property, if made without *actual fraud*, that is, upon a mistaken supposition that the law sanctioned such an appropriation of partnership property, will not make the whole assignment void; though it may furnish occasion in a proper case for seeking the aid of the court in making distribution of the property among the parties properly entitled to it.

Where an assignment which is only partially objectionable, for making to some extent inequitable preferences, a complaint seeking to set it aside altogether, and for breaking up the whole transaction, and to satisfy the plaintiff's debt alone, and not to divide the property, cannot be sustained.

In such case, the assignment is only partially broken up, and then only in a way which shall enable the court to carry out the principle that equality is equity. An action in which all the partnership creditors shall be parties; or for the benefit of the plaintiff and such other creditors as shall choose to come in and make themselves parties thereto; or for an account and distribution of the partnership funds, and avoiding illegal or inequitable preferences, is the proper remedy in such case.

New York Special Term, May, 1860.

THE plaintiffs, as assignees of judgments obtained against the defendants, Platt and Holroyd, for partnership debts, prosecute this action to set aside, for fraud, an assignment made by the defendant Platt to the defendant, Brown in the name of Platt, and Platt and Holroyd. This assignment, on its face, purports to convey the individual and partnership property of the assignors, and to prefer in part the individual debts of Platt to other debts of Platt and Holroyd.

The alleged fraud consists:

1. In the alleged assignment by one partner, without the consent of his co-partner, of the entire partnership property to a trustee for the payment of debts, giving some preference over others.

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2. In the alleged appropriation of partnership property in part to the payment of the individual debts of Platt, in preference to some of those of the partnership of Platt and Holroyd.

3. In providing for the payment of debts which are alleged to be fictitious and unreal.

4. In the fact that the assignee never executed or assented to the assignment.

5. In the fact that the assignee being a non-resident, never took possession of the assigned property otherwise than through a resident agent, and has not personally attended to the execution of the trusts of the assignment, but has transacted the business through said agent.

6. In the fraudulent appropriation and conversion to his own use, and the fraudulent misapplication by the assignee of large sums of money, the proceeds of the assigned property.

HOGESBOOM, Justice. As to the third, fourth and sixth grounds above mentioned, I think the plaintiffs' allegations are unsupported by the evidence. And the last named ground would furnish a better reason for removing the assignee and appointing another trustee in his place, than for breaking up the assignment itself.

As to the fifth ground, it seems to me that if it were true as a question of fact, it would not of itself furnish a sufficient reason for setting aside the assignment, or even of removing the assignee. But I think the allegation as to the entire absence of any personal supervision and control of the assigned property, on the part of the assignee, is not unqualifiedly correct.

As to the first ground of alleged fraud above mentioned, the proof does not support the allegation of fact upon which the legal fraud is supposed to rest. Platt and Holroyd were not partners at the time of the assignment, and had not been for about two months immediately preceding. The assignment was made in October, 1857. In August

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preceding, Holroyd had sold out to one Cheeseman, his interest in the partnership property—and in September, 1857, Cheeseman had sold out to Platt his interest in so much of the partnership property as was attempted to be conveyed by the assignment. The whole legal interest in the property was vested in Platt; and it was not legally necessary for Platt to consult his former partner, Holroyd, as to the disposition of the partnership property, in order to make a lawful and effectual assignment thereof. As the supposed invalidity of the assignment, so far as this ground of fraud is concerned, rests upon an erroneous assumption of fact, it is not necessary to be further considered.

The second is the only remaining ground of alleged fraud, and without discussing the question whether one of two former partners, who has by successive changes of the interest of the other of said partners become ultimately in good faith the sole owner of the partnership property, may not by assignment dispose of the same so as to give a preference to what were originally his own individual debts, I am not clear, upon the evidence in the case, that there was in fact any appropriation of partnership property to the payment of individual debts. There doubtless was an application of the partnership property, by means of the assignment to the payment of debts, for which, or in the incurring of which, Platt's individual name or responsibility was alone given—but Platt claims, and with some reason upon the evidence as to many of them, that all of these were in reality partnership debts or claims, for which the partnership was equitably liable, upon the ground that the moneys or property thus realized were used in the partnership business or for the benefit of the partnership. I have not deemed it necessary to investigate this part of the case, so as to arrive at a final conclusion on this subject, perfectly satisfactory to my own mind, because I have concluded that no actual fraud was intended by Platt,

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in reference to this matter, that is so far as he gave some debts a preference over others; he did not direct the appropriation of partnership property to the payment of debts which he did not suppose were either legally or equitably the debts of the partnership.

It appears from the assignment, that in the introductory part of it not only Platt, and Platt and Holroyd, but James Holroyd are named as the assignors, but it never was, in fact, executed by the latter. It further appears, that in one clause of the assignment the individual debts of Holroyd were preferred to some of the partnership debts of the firm. If this were intentional, it would be evidence of fraud, but I think this clause was inserted by mistake, and under the expectation that Holroyd would unite in the assignment. As to the question previously considered, I am of opinion that, as a matter of law, a postponement of certain debts, confessedly partnership debts, to others, which are really individual debts, but are innocently or mistakenly supposed to be partnership debts, will not avoid an insolvent assignment. The remedy is a different one. Indeed, I think I might go further, and hold that an assignment preferring individual debts, known to be such, over partnership debts, out of partnership property, if made without actual fraud, that is, upon a mistaken supposition, that the law sanctioned such an appropriation of partnership property, would not make the whole assignment void, though it might furnish occasion, in a proper case, for seeking the aid of this court in preventing the misappropriation of the property, and enforcing its distribution among the parties properly entitled to participate in it. Such a proper case is not presented in this suit. The complaint is not filed for such a purpose, nor with such an aspect, and I incline to think under the authorities, the action must in such case be brought so as to make all the partnership creditors parties, or expressly for the benefit, not only of the plaintiff, but of all the partnership

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creditors who will come in and contribute to the expenses of the litigation. In such a contingency, where the assignment is only partially objectionable, for making to some extent inequitable preferences, it is only partially broken up, and then, only in a way which shall enable the court to carry out the principle that equality is equity. This complaint is filed to set aside the assignment altogether, and not to carry it into effect, either in whole or in part; to break up the entire transaction, and not for an account and distribution of the assigned property; to satisfy the plaintiff's debt alone and not to divide the property equitably among all those who have a fair and equal claim to participate in it. I am therefore of opinion that the plaintiffs are not entitled to the relief which they seek in this action.

At the same time, I am not satisfied that the action was commenced in bad faith, or without some reason to suppose, not merely that there was legal, but actual fraud, in the attempted disposition of the property in question. I am not inclined to charge the plaintiff with costs, or to give either of the parties costs as against the others. The defendant, Brown, is entitled to his costs out of the funds in his hands, and the complaint must be dismissed, without prejudice to a suit in which all the partnership creditors shall be parties, or to a suit commenced as well for the benefit of the plaintiff as for such others similarly situated as choose to come in and make themselves parties thereto, or to a suit for an account and distribution of the partnership funds, and avoiding illegal or inequitable preferences, if such there be. If an injunction has been issued, it must be dissolved, and if a receiver has been appointed, the appointment must be vacated. A decree or judgment must be entered, in conformity with these suggestions, and may be settled upon two days' notice.

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COURT OF APPEALS.

ISAAC M. MILBANK, ROBERT W. MILBANK and JEREMIAH MILBANK agt. ALEXANDER DENNISTOUN, JOHN DENNISTOUN, WILLIAM WOOD, WILLIAM CROSS, WILLIAM C. MYLNE and THOMAS SELLAR.

Agents and factors are always bound to the exercise of good faith, and the employment of prudence and skill in reference to the property of others committed to them.

Where the plaintiffs, in New York, on consignment of a cargo of flour to their factors in Liverpool, England, expressed generally, in their letter of instructions, that they wished their flour to be held until the operation of the new corn law (then about to be passed in England,) should have produced its results; or (in substance,) to have the benefit of the new law, unqualified by the consequences of the glut in the market which would probably take place immediately after its passage.

Held, where it appeared from the evidence that the defendants, (the factors,) after the market had been working for some five weeks under the influence of the law, and taking into consideration the result of the English harvest as a material element in determining when the market had attained the equilibrium which had been temporarily disturbed by the large entries of flour for consumption immediately on the passage of the act, sold the flour of the plaintiffs at the market prices then prevailing, that the defendants were not at the time of the sale restrained by their instructions from selling.

Therefore, it was error in the court below, as there was no question of credibility to be determined by the jury, the evidence not being in any respect contradictory, to submit it to the jury to determine whether there had been such breach of instructions.

Leaving out of view the alleged instructions, there was not sufficient evidence upon which the defendants could be charged with a breach of *duty* in selling the flour at the time and for the price they did.

APPEAL from a judgment of the general term of the superior court in the city of New York, affirming the judgment rendered at special term. (For a full statement of the whole facts of the case, see 1 *Bosworth*; 246.)

The plaintiffs are commission merchants in the city of New York, with a branch house in New Orleans. The defendants are commission merchants in Liverpool, with a branch house in New York. The case discloses the following substantial facts: That in the month of June, 1846,

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the plaintiffs shipped to the defendants 5,000 barrels of flour by the ship Nicholas Biddle, and 3,000 barrels by the ship Georgiana. That the flour was all of the same quality, and arrived about the same time, and was all consigned to the defendants as factors. That the plaintiffs sent two letters of instructions, one dated June 25, 1846, and the other still more particular and explicit, dated June 27, 1846, which letters were both received by the defendants before the flour arrived. These letters are as follows:

" NEW YORK, June 25, 1846.

Messrs. A. DENNISTOUN & Co., Liverpool :

Gents : We had this pleasure 30th ult., advising of shipment to your address an invoice of flour per ship 'N. Biddle,' from N. Orleans. We would now inform of having consigned to you five thousand (5,000) barrels flour per 'N. Biddle,' and three thousand barrels flour per ship 'Georgiana,' (3,000) both from New Orleans. Owing to some oversight at N. O. we have not rec'd the entire sets of bills of lading, and have therefore been unable to perfect our arrangements with your house here, but hope to do so in time for the 'Caledonia' mail; when we shall hand you invoices.

You will please make no disposition until we give you our wishes, per 'Caledonia,' unless 22s in bond is obtainable, in which case, if in your judgment deem it our interest to accept that sum, please to do so.

Our R. W. Milbank designs visiting your city soon, and we trust our correspondence may be extended. Owing to the apprehension of exorbitant premium for the 'war risk' being demanded, we have, under the advice of your house here, covered these shipments by insurance in our city co's. The same is subject to an average of five per cent. damage.

Very respectfully,

J. & R. MILBANK & Co."

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"Caledonia." "New York, June 27, 1846.

Messrs. A. DENNISTOUN & Co., Liverpool:

Gentlemen: Enclosed you will please find invoices of five thousand barrels 'superfine' flour pr. ship 'Nicholas Biddle,' and three thousand barrels 'superfine' flour, pr. ship 'Georgiana' to your address. The bill lading we have handed to your Messrs. Dennistoun & Co., with whom we have made arrangements to advance us two dollars and seventy-five cents pr. barrel on the shipment pr. 'N. Biddle' and two dollars and twenty-five cents pr. barrel on shipment pr. 'Georgiana' based on sixty days, sterling bills at 8 pr. ct. This flour is from the best Cincinnati mills, and in fine order, having been forwarded directly from flat boats to ships. We are induced to hope for its sharing a better fate than ordinary shipments from N. Orleans, as we trust it may arrive out in sweet condition. When shipping, we had hoped for a better market than the prospect now justifies. We fear the first introductions for consumption may tend to continue low prices, as they will probably be large immediately on the passage of the new bill. Believing that after the stocks now in bond shall have been reduced by consumption, &c., that an improvement may ensue, we would express our desire that these parcels may be withheld from the market until the operation of the new law shall have produced its results. We hope we may not err in assuming its passage. Though if 22s. in bond is obtainable on arrival, and you think our interest dictates such sale, please so dispose of it; as we have before advised, the shipments are insured here under direction of your house. Our R. W. Milbank designs visiting your city by steamer 17 July and will confer with you.

Very respectfully, your obedient serv'ts,

J. & R. MILBANK & Co."

Endorsed "Rec'd 12th July."

That the British corn law bill reducing the duties on foreign breadstuffs was then before parliament, and the

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flour was shipped, and the instructions were given in view of the immediate passage of the law. That the bill received the royal assent on the 27th of June, 1846, and went into operation three days thereafter. That the flour was insured in New York for \$4 per barrel, and alleged to have cost the plaintiffs, delivered in Liverpool, upwards of \$5 per barrel, which, as alleged, was known to the defendants on or before its arrival.

That the defendants sold the 5,000 barrels per Nicholas Biddle on the 4th, 5th and 7th of August, and at such sacrifice as to give plaintiffs but \$2.17 per barrel. That before they sold the Georgiana flour one of the plaintiffs reached Liverpool, and that shipment was not sold until September, October and November following. That if the Biddle flour, which was of the same precise quality, and which arrived at the same time, had been held as the Georgiana, it would have netted the plaintiffs, computing interest up to the day of trial \$14,530.29 more than they received.

The plaintiffs claimed this sum as their damages for the sacrifice of their flour, on the ground that the defendants, being factors of the plaintiffs, had disobeyed their instructions; they did, and had not used reasonable diligence and skill in selling under the circumstances and at the time. On the trial, the jury found that the defendants would have been excusable, had they held the flour till the day of , and the verdict was rendered for the value of the flour on that day, to wit: for \$7,829.62. Upon this verdict the judgment was entered, from which the defendants have appealed. The proofs consisted mostly of correspondence, and of depositions taken by the defendants.

FOSTER & THOMSON and F. B. CUTTING, *for appellants.*
PIERREPONT & STANLEY and JAS. T. BRADY, *for respondents.*

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DENIO, Judge. The case turns very much upon what is to be considered the true meaning of the letter of June 27, 1846. In that letter the plaintiffs' expressed their desire that the cargo of flour in question should be withheld from the market until the operation of the new corn law should have produced its results. The direct effect of the law was greatly to reduce the duty upon wheat and flour imported into the United Kingdom. Its operation upon the owners of the flour then lying in bond at the British ports, and of such as should thereafter arrive, would be to give them a more advantageous competition with the holders of domestic flour by the amount of reduction of the duty. If they sold their flour free of duty, or, in other words, if they paid the duty themselves, they could sell at a smaller nominal price in consequence of the reduction of the duties and yet realize larger profits on the sales. The price of domestic flour must always be a material element in determining the market of the imported article, as the two classes of produce immediately come into competition in the English markets. The revenue duties may be looked upon as parcel of the expenses of foreign shippers of flour and are of the same character so far as this question is concerned, as the freight or insurance. It is for his interest to have them fixed at the lowest rate. Hence the plaintiffs regarded the corn law for the reduction of the duties as a market advantage in their favor which they were desirous of realizing the benefit of. But they saw also what was sufficiently obvious, that this advantage might be neutralized at least, if not more than balanced, by the great accumulation of imported flour remaining in bond and awaiting the new parliamentary measure which, in the event of a passage, would be released at the anticipated low duties, and thrown upon the market in competition with their own flour taken out by the Nicholas Biddle, and producing what is termed a glut in the market. The object of the instructions of the

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27th June plainly was to guard against this state of things. The plaintiffs said to the defendants in effect, we desire to have the benefit of the new law, which we trust will pass, but we fear that if our flour is sold when the first introductions for competition take place immediately upon the passage of the bill, we shall lose the advantage. We desire, therefore, that it may be withheld from the market until the operation of the new law shall have produced its results, in other words, we wish to have the benefit of the new law, unqualified by the consequences of the glut in the market which we foresee will take place immediately after its passage. But there were other circumstances which it was foreseen would enter into the state of the market, the most material of which was the approaching harvest in the United Kingdom, which must always have a material influence upon the price of breadstuffs in the market of that country, as it is well known they have for the same reasons in the markets of countries which export grain. The plaintiffs, therefore, did not direct the defendants to withhold their flour from market for any definite period, which, if they had done, the defendants must have obeyed the direction at their peril, nor did they require that it should be kept out of market until any particular amount of diminution of the stock released from bond should have been realized, but they chose to express their desire in very general terms. They wished their flour to be held until the operation of the new law should have produced its results. This of course cast upon the defendants the duty of determining, under all the circumstances bearing upon the question, when the period referred to should arrive. This would not depend wholly upon the degree to which the old stock of imported flour should have been reduced, but also upon the prospect of the domestic corn. It was, no doubt, implied that the flour was not to be sold until the stock of imported flour existing when the law should pass should have been materially

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reduced by consumption; though the direction is not to that effect in terms, it is recited, as a belief of the plaintiffs that a reduction would cause an improvement in the market, as it obviously would, if not met by counteracting circumstances. We are to determine, therefore, whether, upon the construction which has been given to the letter, the defendants departed from the instructions contained in it by selling flour on the 4th of August, supposing it had all been sold on that day. The act took effect as a law, June 30, and immediately all the flour then in bond was released by the payment of the reduced duties, and that subsequently arriving was entered and the duties at once paid. The holders immediately became free sellers. The demand from this country was large and freely met. These sales were for consumption, not a speculation. They were, therefore, the kind which were referred to in the plaintiffs' instructions. They operated to reduce the stock in bond at the time the act passed; but the evidence does not furnish any means of ascertaining the amount positively of such reduction, or how far it was balanced by fresh importations, though it appears that the quantity on hand continued to be large.

While this state of things was going on, the plaintiffs' letter was received, on the 12th of July, and about a week after, on the 18th, the vessel with the flour arrived. It should be remembered that when the letter was written it was not known in New York that the act had passed. In fact it received the sanction of parliament the same day on which it was written. The letter looked to the passage of the act, and not to the arrival of the flour, as the time when the reduction referred to would commence. So far as the plaintiffs knew, it might not become a law until after the flour should have arrived. Indeed, they were not certain that it would become a law at any time. What they chose to forbid, (if the letter is to be looked upon as peremptory,) was that their flour should not be thrown

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upon the market in competition with the mass which would be on sale immediately upon the passage of the act. Now the sale of the first parcel of the flour was made five weeks after that point of time. During all of which interval sales were being constantly made for consumption.

In the opinion of the superior court, at general term, the letter is construed as though the defendants were forbidden to sell until the stock of flour should be reduced, by consumption, after the arrival of the Nicholas Biddle, and it is reasoned that as it was sold soon after that time, it was not withheld from market for any period. The charge, I think, contains the *same* idea as to the construction of the letter. But, upon that construction, the defendants would be obliged to withhold the flour from market, though, when it arrived, the effect of the law had been fully ascertained. The meaning of the letter plainly is, that the plaintiffs did not wish the flour sold during the existence of the glut which it was anticipated would prevail upon the passage of the act. In my opinion, the defendants were not, on the 4th of August, restrained from selling the flour by instructions contained in the plaintiffs' letter. The market had been working for five weeks under the influence of the law. The letter had fixed no period for the continuance of the experiment, and the defendants were left to determine whether the time had arrived when it would be for the plaintiffs' interest to have the property disposed of in the view of all the circumstances of the case. They were, nevertheless, bound to the exercise of good faith, and of the prudence and skill which agents to whom the property of others is entrusted are always obliged to employ, and that was the extent of their obligation. That this view is correct, is apparent from the plaintiffs' own letter of July 31. This was written, it will be remembered, four days before the first parcel of flour was sold. In that communication the plaintiffs say, "we suppose that ere this the crop of wheat has been ascer-

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tained as to its probable yield, and the grain and the flour conformed to such result, we therefore ask you to exercise your discretion in effecting sales for us." As this letter was not received until after the last sales of flour, it cannot be used to dispense with any instructions binding upon the defendants when the sales were made; but it affords evidence that the plaintiffs considered that the result of the English harvest was a material element in determining when the market would have attained the equilibrium which it was supposed would be temporarily disturbed by the large entries for consumption immediately upon the passage of the act. This was precisely the view which the defendants appear to have taken of the case when they made the sales. The grain circular of the 3d of August, which the plaintiffs gave in evidence, declared the harvest as progressing favorably and the weather was remarkably fine. Then it was proved affirmatively, on the part of the defendants, that no improvement in the price of flour resulted from the passage of the corn law at any time during the year 1846.

Upon the question whether the defendants had violated their instructions the burden of proof was upon the plaintiffs. All the material testimony bearing upon the subject was produced by them. There was no question of credibility to be determined by the jury, for the evidence was not in any respect contradictory. Thinking, as I do, that there was no evidence tending to show that the defendants sold the plaintiffs' flour prior to the time when the operation of the new corn law had produced its results so far as those results affected the price of flour, I think the judge erred in submitting it to the jury to determine whether there had been such breach of instructions.

Upon the second question, whether, leaving out of view the alleged instructions, there was evidence upon which the defendants could be charged with a breach of duty in selling the flour at the time they did, and for the price

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which was obtained, I think there was an equal defect in the evidence. In the first place, it was proved that all the large holders of flour were freely selling at the price which then prevailed, and that the defendants themselves were among the sellers. On the 6th of August they sold 3,000 barrels of their own flour at a less price than that which they obtained for the plaintiffs. It was shown that all the indications were in favor of an abundant domestic harvest; and no immediate improvement in prices was looked for among the dealers in breadstuffs in that market; the prices obtained were the market prices prevailing at the time of the sales, and for some time afterwards; the plaintiffs' flour was a damaged article, and liable to further depreciation if kept on hand. The subsequent extraordinary rise was owing to causes wholly exceptional in their character, which were not so far developed when the sales took place as at all to influence the market; and could not have been anticipated with any degree of sagacity. In looking at the case after the event, we can see that if the defendants had refrained from selling, the adventure would have resulted quite differently as regards the plaintiffs. They would have realized large gains, instead of having suffered a loss, but it would not have been owing in any degree to the corn law.

It seems plain to me that there was not the slightest reason in the evidence to impute blame to the defendants, and that there was nothing for the jury to deliberate upon. If these views prevail with my brethren, the judgment must be reversed and a new trial ordered.

Judgment reversed and new trial ordered.

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SUPREME COURT.

IN THE MATTER OF THE APPLICATION OF SEVERAL GRADUATES OF THE LAW SCHOOL OF COLUMBIA COLLEGE, TO BE ADMIT- TED TO PRACTICE AS ATTORNEYS AND COUNSELLORS OF THIS COURT.

The right and duty to examine, inquire and determine, whether or not an applicant for admission to practice as an attorney and counsellor of this court, is qualified for and entitled to such admission is, by the constitution, vested in the court; and the legislature cannot take away such right.

The act of the legislature upon this subject, passed April 7, 1860, in relation to the law school of *Columbia College*, does not materially differ from the act relative to the law school of the New York University, and the principle of the decision made in that matter (*ante page 97.*) applies to and must determine the present application.

New York General Term, June, 1860.

SUTHERLAND, MULLIN and BONNEY, Justices.

By the court—BONNEY, Justice. By the act entitled "an act relative to the law school of Columbia College," passed April 7th, 1860, it is enacted, that the professors in the law school of Columbia College, and the law committee of the trustees of said college, are constituted a committee, any three of whom, being counsellors at law, shall form a quorum, upon whose examination and recommendation, as evidenced by the diploma of said college, granted upon such recommendation, *any graduate of said law school shall be admitted to practice as an attorney and counsellor at law, in all the courts of this state;* and that no diploma shall be sufficient for such admission, which is given for any period of attendance upon the said school for a term less than eighteen months; but this period of eighteen months shall not apply to the members of the present senior class in said law school; who *may be admitted to practice as aforesaid upon the examination and recommendation of said committee, and upon the evidence of*

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the diploma of the college; and all acts and parts of acts inconsistent with said act are repealed.

Under this act, several members of the present senior class of Columbia College now apply to be admitted to practice in this court.

They present to the court, as evidence of their right to such admission :

1. A certificate dated 21st May, 1860, made by the law committee, of said college, to the effect, that said committee being severally of the degree of counsellor at law in this court, and having, with the assistance of the professor of municipal law in said school, duly and thoroughly examined the several persons therein named, being members of the present senior class of said law school, do find, certify and report, them, and each of them, to be well and sufficiently qualified to receive the diploma of bachelor of law from said college, to practice as attorney and counsellor at law in all the courts of the state of New York.

2. An order of the trustees of the college, dated 21st May 1860, whereby, after reciting, that the same persons named in said certificate were duly recommended for the degree of bachelor of laws, it is ordered, that the degree of bachelor of laws be conferred on them.

3. Diplomas of said college, dated 22d May, 1860, by which the trustees of the college declare and make known :

That, under the authority of their charter and of the act of April 7th, 1860, above mentioned, they have caused the same persons named in said certificate and order, being members of the present senior class of the law school of the college, to be examined by the professors of said school and by the law committee of the college; that the said examiners have recommended such persons as in all respects fully qualified to receive the degree of bachelor of laws, and that on such examination and recommendation, said trustees admit such persons respectively to said degree, conferring on them all the rights and privileges any where

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recognized as belonging to that degree—constituting them graduates of said law school—and granting them such diploma, *as evidence that they respectively are entitled to said degree, and also, pursuant to the provisions of said act, to be admitted to practice as attorneys and counsellors at law in all the courts of the state of New York.*

The constitution of this state, adopted in 1846, provides (article 6, sec. 8.): That *“any male citizen, of the age of twenty-one years—of good moral character—and who possesses the requisite qualifications of learning and ability, shall be entitled to admission to practice in all the courts of this state.”*

The Revised Statutes of 1830, provide that counsellors, solicitors and attorneys shall be *appointed and admitted to practice* by the courts in which they intend to practice; that the *supreme court shall prescribe the rules and regulations under which counsellors and attorneys shall be appointed and licensed therein, that no person shall be admitted unless approved by the court for his good character and learning;* that, on admission, they shall take and subscribe the oath of office; and they shall be regulated by the rules and orders of the court, and subject to be removed or suspended by the court for any deceit, mal-practice or misdemeanor, and these statutes were in force when the present constitution was framed and adopted.

The rules of the court—prepared, revised and adopted pursuant to section 470 of the Code,—provide, that *applicants* for admission to practice as attorneys and counsellors, who are *entitled to examination*, shall be examined in open court—that such examination shall be had at general term, at prescribed times, and at no other time or place—and that no private examination shall be permitted; and that to *entitle him to examination* the applicant must prove to the court,—

That he is a citizen of the United States, is 21 years of age, is a resident of the district in which he applies, and

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is of good moral character; and that every applicant must sustain a satisfactory examination upon prescribed subjects—and if admitted must sign a roll and subscribe and take the constitutional oath of office.

The act of 7th April last, in relation to the law school of Columbia College, under which the present application is made, purports to constitute certain persons therein designated a committee, upon whose examination and recommendation, as evidenced by a diploma granted thereon, *any graduate of said law school shall be admitted to practice as an attorney and counsellor at law in all the courts of this state.*

The certificate, order and diplomas now presented purport only that the persons therein named have been examined as in the act of April 7th provided, and on such examination, found to be duly qualified to receive the degree of bachelor of laws—and thereupon diplomas have been issued to them as evidence that they are entitled to that degree, and under the act, to be admitted to practice as attorneys and counsellors.

They do not state, nor is any evidence offered to show that the persons in the diplomas named are citizens, or twenty-one years of age, or of good moral character, as required by the constitution.

Or that they are residents of the judicial district, as required by the rules. Of these several facts, therefore, which are made prerequisites to an examination, other evidence must necessarily be given, and, we presume, can be furnished, and may be filed according to the usual practice.

As to the remaining and principal question, arising on the present application, it has been decided, at the present general term of this court, in the matter of the application for admission of the graduates of the law department of the University in this city to practice, &c., that the legislature has no power, under the constitution of this state,

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to make a diploma, conferred by a law university, sufficient evidence that the applicant for admission has the proper qualifications of learning and ability to entitle him to a license; in other words, it has been held by this court, that the right and duty to examine, inquire and determine, whether or not an applicant for admission to practice as an attorney and counsellor of this court, is qualified for and entitled to such admission, is, by the constitution, vested in the court; that the legislature cannot take that right from the court, and that the court, however willing to be relieved from the performance of the duty imposed, cannot decline it.

In relation to this question, the act of the legislature, now before us, does not materially differ from the act relative to the law school of the University—and the principle of the decision made in that matter applies to and must determine the present application; and, however good cause the court may have to believe that the persons in whose behalf this application is made have been thoroughly examined, as certified by the papers presented, and found to possess the requisite qualifications to entitle them to admission to practice, the present application must be denied, for the reason that the *requisite legal evidence* that they possess such qualifications is not before us.

SUPREME COURT.

JULIA DEMELT agt. GEORGE H. LEONARD and others.

It is clear that the *fairness* of a judgment obtained against a *lunatic* may be attacked by an *equitable action* instituted by his *committee*.
And, as under our present system, general jurisdiction in law and equity has been conferred on this court, there is no well grounded objection to its setting aside judgments against lunatics on motions made by their committees.
Difficult questions of fact arising on such motions may be referred to a referee to determine.

Demand agt. Leonard.

Broome General Term, May, 1860.

Present, MASON, BALCOM, CAMPBELL and PARKER, Justices.

APPEAL from an order made at the Delaware special term in May, 1859, denying without costs, the motion made by Nathan Thompson, who had been appointed the committee of the person and estate of the plaintiff, to set aside the judgment in this action that had been previously entered in favor of the defendant, Leonard, against the plaintiff for costs.

E. E. FERRY, for plaintiff.

A. BECKER, for defendant, Leonard.

By the court—BALCOM, Justice. The judgment was rendered against the plaintiff before the issuing of the commission to inquire in regard to her lunacy; but the finding of the jury that the plaintiff had been of unsound mind and incapable of taking care of herself or her affairs without interval for about nine years, is presumptive evidence that she was a lunatic when the judgment was obtained. (2 *Paige*, 427; 6 *Wend.*, 497.) The case of *Osterhout agt. Shoemaker*, (3 *Hill*, 513,) shows that the inquisition is evidence, even as against strangers to the proceeding, who had no opportunity to offer or cross-examine witnesses. They must overcome the presumption created by the inquisition by evidence on their part.

When an application was made to the chancellor to set aside some judgments recovered against a lunatic in actions at law, he used this language: "I doubt whether it is right to interfere in this summary way to deprive the plaintiffs of their legal liens, although the recovery of the judgments and the whole proceedings in those suits are overreached by the finding of the jury, under the commission of lunacy. As the court of law had jurisdiction of the cases, if the judgments are either irregular or erroneous, on the ground that the suits were prosecuted against

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a defendant who was legally incompetent to make any defence thereto, the remedy appears to be by a summary application to the court in which the judgments were obtained, or by a writ of error. Or if there is no remedy at law, and the judgments have been improperly recovered against a lunatic, for pretended claims, which were not justly due, it may be a proper case for the committee to proceed by a bill in equity, to be relieved against such judgments." (*In the matter of Hopper*, 5 *Paige*, 491.) The supreme court refused, under our former system of practice, to set aside a judgment obtained by default against a person who had been found by inquisition to be an habitual drunkard. The court said: "We do not think the proceedings irregular. The committee should apply to the court of chancery." (*See case in 4th Denio*, 262, in which *Robertson* agt. *Lain*, 19 *Wend.*, 649, is cited.) This court held in *Sternbergh* agt. *Schoolcraft*, (2 *Barbour*, 153,) that a judgment recovered in a court of law against a person who has been found a lunatic or an habitual drunkard, and whose person and property have been placed in the custody of a committee, will not, for that reason, be held void. The same doctrine was asserted in *Crippen* agt. *Culver*, (13 *Barbour*, 424,) but such judgments are not conclusive upon the committee of the lunatic. They may be examined and their fairness ascertained. The equitable rights of the lunatic will be protected. (*See 2 Paige*, 153; 14 *Barbour*, 488.)

It is clear that the fairness of a judgment obtained against a lunatic may be attacked by an equitable action instituted by his committee. It may be modified or annulled in such an action. And as the court of chancery has been abolished, and general jurisdiction in law and equity has been conferred on this court, (cons. art. 6, § 3,) I can see no well grounded objection to this court setting aside judgments against lunatics, on motions made by their committees. Difficult questions of fact arising on such

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motions may be referred to a referee to determine. (Code, § 271, sub. 3; 18 N. Y. Rep., 484.)

In this case the plaintiff was beaten by reason of a settlement, which the inquisition *prima facie* shows was made with her when she was a lunatic. And it was made under circumstances that satisfy me the judge should have set aside the judgment and ordered a new trial, or directed a reference to ascertain the fairness of the settlement and the sanity of the plaintiff at the time she made it. I am therefore of the opinion the order appealed from should be reversed; but without costs to either party, as the practice in such cases has not been settled since the existing organization of our courts. I also think no other disposition of the motion should now be made, for the reason that we have, at this term, reversed the judgment against the plaintiff and granted a new trial costs to abide the event, on an appeal from the judgment itself, for an error committed on the trial.

Decision accordingly.

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NEW YORK SUPERIOR COURT.

JOHN A. PHELPS and others agt. JAMES A. FERGUSON.

Sufficiency of allegations in a complaint by plaintiffs as indorsers of a bill of exchange.

Special Term, October, 1859.

BOSWORTH, Ch. Justice. A complaint by plaintiffs, as indorsers of a bill of exchange, which alleges the drawing of the bill, (describing it); a delivery of it to the payee, "who then and there indorsed it and delivered it so endorsed, and thereafter, and before maturity, the same came lawfully into the possession of these plaintiffs for

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value;" that it is past due, and wholly unpaid; "and the defendants are now jointly indebted to these plaintiffs thereon in the sum of \$1,200, with interest," states facts sufficient to constitute a cause of action.

As to the objections that the plaintiffs are not alleged to be partners, or joint owners of the note, and do not show how they got title, it is sufficient to say that the allegation that the bill, after it had been indorsed and delivered by the payee, and before maturity, "came lawfully into the possession of the plaintiff for value," cannot be true, unless they obtained it from some one having lawful right to dispose of it. It is a short mode of averring the fact of actual ownership; that averment is sufficient on demurrer. If the declaration is deemed defective in form, the remedy is under section 160 of the Code. (*Prindle agt. Caruthers*, 1 N. Y. R., 425-431.)

Such a complaint being held by reported cases to be sufficient, a demurrer to it, on the ground that it does not state facts sufficient to constitute a cause of action, must be treated as frivolous, although it might not be frivolous, if the question were *res nova*. (*Griswold vs. Laverty*, 12 Leg. Obs., 316, s. c., 3 Duer, 690, and *Price agt. McClave*, 5 Duer, 670, note.)

Judgment ordered for plaintiffs on account of the frivolousness of the demurrer.

NEW YORK COMMON PLEAS.

McGRANE agt. THE MAYOR, &c., OF NEW YORK.

A plaintiff, having obtained judgment at circuit, and the judgment being reversed at general term and a new trial ordered, the costs to abide the event, on the ground that the complaint did not contain an allegation of a fact essential to be proved in order to entitle him to recover,
Held, on motion, that he be allowed to amend his complaint for the purposes of the new trial, on payment of all defendant's costs since the answer, and relinquishment of his contingent right to costs of appeal, if successful on the new trial.

McGrane agt. Mayor, &c., of New York.

At Chambers, May 29, 1860.

THE complaint contained allegations for work and labor done at the request of defendants. At the trial the plaintiff recovered judgment. On the appeal the judgment was reversed and a new trial ordered, the costs to abide the event, on the ground that the contract in writing between the parties contained a clause that payment was to be made after the common council of defendants had made an appropriation therefor, and the complaint contained no allegation either that an appropriation had been made, or that the plaintiff had petitioned the common council for payment and that a reasonable time had elapsed to enable them to make the appropriation. The plaintiff then moved for leave to amend his complaint by inserting allegations in conformity to the opinion of the general term.

GEO. R. THOMPSON, *for the motion.*

GREENE C. BRONSON, *opposed.*

BRADY, Judge. The motion must be granted. The plaintiff, however, must pay, as a condition of the order allowing the proposed amendment, the defendants' taxable costs since the answer was served, and must relinquish his right to the costs of the appeal heretofore determined ordered to abide the event of the new trial, in the event of his succeeding in the action. (*Downer agt. Thompson 6 Hill*, 377.) Ordered accordingly.*

* Costs adjusted by the judge so as to include all defendants' costs since the answer, the costs of the appeal, and all defendants' disbursements, to be paid as a condition of the order.

YALE agt. Dederer.

SUPREME COURT.

RANSOM YALE agt. ELIZA ANN DEDERER, by her next friend
Nicholas A. Dederer, and NICHOLAS A. DEDERER.

The court of appeals, in this case, (18 N. Y. R., 265, and 17 How. Pr. R., 165,) held, that Mrs. Dederer, the defendant, did not charge her separate estate by the execution of a promissory note with her husband, as his surety, not for her own benefit or the enhancement of her estate; that equity will not enforce against her a promise which is void at law; that in such case her separate estate can only be charged by virtue of some instrument for that purpose.

On the second trial of this case, this court at general term held, that the evidence showed that Mrs. Dederer, independent of the act of signing the note as surety, did intend to, and did in fact charge her separate estate with the payment of the debt, by a *verbal agreement or understanding* between her and the plaintiff.

The evidence (which of course is now given very full) principally relied on to establish this agreement is the *plaintiff's testimony* (not uncommon under § 399 of the Code) which states, "I told her that if I extended the time, I depended upon her for security for payment of the note; Mr. Dederer said you need not be afraid, if I am not able to pay it my wife is; she said yes, if Nicholas is not able to pay it, I am."

(*The question seems to be, is such an assertion any thing more than a VERBAL JUSTIFICATION as SURETY; or of her ABILITY to perform a contract which the law says she cannot make, and if made, a court of equity will not enforce. R.E.P.*)

Sixth District, General Term, May, 1860.

MASON, BALCOM, CAMPBELL and PARKER, Justices.

APPEAL by Eliza Ann Dederer to the general term, from the judgment entered against her at special term on the 4th day of August, 1859; being the second trial of the case; the court of appeals having reversed the judgment of the general term on the first trial, and ordered a new trial. (18 N. Y. R., 265; s. c., 17 How. Pr. R., 165.)

The action was brought to charge the separate estate of Eliza Ann Dederer, the wife of Nicholas A. Dederer, with the payment of a promissory note, of which the following is a copy, to wit:

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"\$998. On the first day of May next, we, or either of us, promise to pay Ransom Yale, or bearer, nine hundred and ninety-eight dollars, with interest, for value received.

GREENE, Dec. 26, 1853.

N. A. DEDERER.

ELIZA ANN DEDERER."

It was admitted on the trial that this note was given for two promissory notes held by the plaintiff, one of which was for \$589.83, dated Dec. 23, 1852, payable on the first of April, 1853, signed by N. A. Dederer and Eliza Ann Dederer, and the other for \$348, dated March 19, 1853, payable on the first of November, 1853, signed by N. A. Dederer, only.

The plaintiff proved that the said Nicholas A. Dederer made an assignment for the benefit of his creditors on the 9th March, 1854, and was insolvent. That the plaintiff herein had recovered judgment against him on the note in suit on the 30th May, 1854, for \$1037.29, and that execution had been issued thereon and returned unsatisfied on the 29th June, 1854. It was admitted that Mrs. Dederer was the owner in fee simple absolute of the farms of land mentioned in the complaint, to wit: a farm of about 200 acres, in German, called the Gould farm, and a farm of about 215 acres in Smithville, called the Warner farm, and a lot of land in Greene or Smithville containing about 90 acres, called the McIntosh lot; and that her separate estate also consisted of personal property. It was fully admitted that Mrs. Dederer's separate estate was sufficient to satisfy any judgment that could be rendered in the action.

The evidence upon the merits and bearing upon the question of intent by Mrs. Dederer, to charge her separate estate, was substantially as follows:

Albert Yale, a brother, and, at the time of the sale of the cows, a partner of the plaintiff, testified, that he knew of the sale of the two lots of cows to Mr. Dederer—the first lot of 21 cows in February, 1852, and the second lot of 12 cows in February or March, 1853. Plaintiff said to

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Mr. Dederer that he wanted to sell them so that he could be safe—collect the money when he wanted it, and when it became due; and Mr. Dederer asked what would make him safe, and plaintiff answered, your wife's note and yours together would be safe, I think; that would buy the cows. Plaintiff asked Mr. Dederer if there were any claims upon Mrs. Dederer's property, and he said there were not, or not enough to amount to anything. Plaintiff said, I suppose it is no more than right that she should sign the note, for I suppose the cows are going on her and your premises. Mr. Dederer said, I think I shall distribute them about, or something to that effect. Witness thought Mr. Dederer mentioned that he was going to drive them off the Warner farm. Mr. Dederer gave his own note for the 21 cows at this time; and said when plaintiff came down to Greene, he would give his own note with his wife, or a satisfactory note. It was to be a note of Mr. Dederer and his wife in satisfactory form. On the sale of the second lot, the conversation and agreement was substantially like the first. As witness was passing along the road he noticed half a dozen cows on the Warner farm; did not recollect whether it was after the sale of the first or second lot. Mrs. Dederer was not present at the conversation and agreement testified to.

This testimony was objected to, on the ground that Mrs. Dederer was not present. The objection overruled, and the testimony admitted.

James H. Wavle—lived on the Warner farm and worked for Mr. Dederer in February and March, 1852; drove about twenty cows, bought of Yale, to the Warner farm; they were selected out and in a lot by themselves. Mr. Dederer told him what cows to drive there. These cows were left on the Warner farm from four to six weeks; they were most of them taken to the King farm, owned by Mr. Dederer; they were taken to the Warner farm to eat up some hay, being a scarcity of hay at the King farm; none

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of them were milked on the Warner farm; as they began to make bag they were driven to the King farm.

Ransom Yale, the plaintiff, testified to the conversation and agreements between him and Mr. Dederer, as to the sale of the cows, and giving the notes, substantially as testified to by his brother, *Albert Yale*. He then said that on the 26th day of December, 1853, the two notes were past due; "I went to Greene, to Mrs. Dederer's house; Mr. Dederer and I went to the house together; I told him I came for my pay; he said he could not conveniently pay then; Mrs. Dederer was in and out; Mrs. Dederer was there part of the time and part not; she was in and out of the room; I said I was afraid of losing it to let it run; he said if he was not able his wife was, and that I could make myself perfectly secure; I said I wanted the money; he said he thought if I was secured I could wait, and proposed giving his wife as security again; I told him if I was safe I could do it I suppose, and as he proposed giving his wife, I inquired into the circumstances again of her property; he told me there was a mortgage of \$2,500, given upon the Warner farm since the last sale of cows; I told him I was afraid if I didn't collect it then, I would have trouble about collecting it; Mr. Dederer thought I would be safe with his note and his wife's." (All the above conversation was objected to; objection overruled, and defendant excepted.)

"We then reckoned the interest on the two notes, and found that it was \$998; he wrote a note and went into another room to get his wife to sign it; think she was not in; he then signed the note; he then took it out, and soon the note came back signed N. A. Dederer and Eliza A. Dederer; she came back with him; I asked her if she had changed her name, why the note was not signed as the note had been previous, by Eliza Ann Dederer; she said she sometimes signed it so; I told her I wanted it right; I told her that if I extended the time, I depended upon

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her for security for payment of the note ; Mr. Dederer said, you need not be afraid, if I am not able to pay it, my wife is ; *she said yes, if Nicholas is not able to pay it, I am* ; then we drew up a new note, and the note in suit was executed at that time, and I gave up the old paper and took the new one ; I think I have seen some of the cows on the Warner farm in May or June, 1854 ; I think I saw about twelve on the Warner farm ; I will correct that, I think it was May or June, 1853 ; I think it was in the spring before the assignment ; I think I saw the same cows in Willett ; I saw the cows in pasture at Warner farm, which was a dairy farm."

The plaintiff closed his case, and the defendant moved to strike out all the evidence of conversation had between Nicholas A. Dederer and Ransom Yale, when the said Eliza Ann was not present. The court refused to thus strike out, and the defendant excepted. The defendant then moved to non-suit the plaintiff, upon the ground that upon the facts proved, the separate estate of the said Eliza Ann Dederer was not liable for the payment of the note in suit ; the court refused to non-suit, and the defendant, Eliza Ann Dederer, excepted. Judgment was thereupon rendered that the amount of the note, principal and interest, was due to the plaintiff, and was an equitable lien upon the personal and real estate of the defendant, Eliza Ann Dederer.

SELAH SQUIRES, *for appellant.*

HENRY R. MYGATT, *for respondent.*

By the court—MASON, Justice. When this case went to the court of appeals before, there was no evidence in the case of an intent on the part of Mrs. Dederer to charge her separate estate with the payment of this debt of the plaintiff, except the bare fact that she signed the note with her husband, as surety for him. In short, there was no

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evidence of an intent to charge her separate estate with the payment of the debt except what equity would infer from the act of signing. I held on the first trial that the fact that she signed the note as surety for her husband furnished of itself evidence of an intent to charge her separate estate, acting upon the doctrine of some of the cases in equity, which hold that the wife must intend something by signing, and as she knew that she could create no personal obligation or liability by signing, she must be deemed to have intended to charge her separate estate in equity. (2 *Barb.*, 284.)

The court of appeals reversed the judgment, and have certainly settled the rule that from the bare act of signing a note as surety for her husband, no such intent to charge her separate estate in equity shall be inferred, and that she does not charge her separate estate by the bare act of signing a note as surety for her husband. The case is now changed by evidence on the last trial, which not only shows that she signed the note as surety for her husband, but the evidence shows further and independent of the act of signing, that she did intend to charge her separate estate, and did charge it with the payment of this debt, if any verbal agreement or understanding between her and the plaintiff to that effect can charge it. This brings us to the real question in the case. Can a married woman, by signing a note as surety with her husband, intending thereby to charge her separate estate, and agreeing verbally or by parol that her separate estate shall be charged, bind her estate in equity to the payment thereof? The court of appeals did not decide this question against the plaintiff, when this case was before that court on the former appeal. Judge Comstock admits that when a married woman holds the fee of lands under the acts of 1848 and 1849, she may charge it. He says, (18th *N. Y. R.*, page 272,) "my conclusion therefore is, that although the legal disability to contract remains as at common law, a

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married woman may as incidental to the perfect right of property and power of disposition which she takes under the statute, charge her estate for the purposes, and to the extent, which the rule in equity has heretofore sanctioned, in reference to separate estates." It was admitted on the last trial that Mrs. Dederer is the owner in fee simple absolute of the real estate charged in the complaint herein as her separate estate, and that she became seized in fee thereof subsequent to the acts of 1848 and 1849; and Judge HARRIS, at page 281, speaking of this very case, says that a married woman will charge her separate estate "*when the circumstances of the case are such as to leave no reasonable doubt that such was her intention.*" He says again, at page 283, "it is simply a rule of evidence; all agree," he adds, "that when the wife has expressly charged the payment of a debt upon her separate estate, whether it be her own debt or the debt of another, such charge is valid and will be enforced."

He regards the right of enjoyment of separate property as necessarily including the right of disposition, and the power of disposition embraces the power to charge her estate, and he adds, "*when she does this of her own free will, uninfluenced by any unfair practices, however injudicious the act, the charge must be enforced.*"

Applying these principles to the case before us, there can be no doubt of the defendant's liability in this case. This certainly is no new doctrine in regard to the power of a married woman in equity over her separate property. It is the clear and uncontested doctrine of the court of chancery, in England, and of the courts generally in this country, and, as I understand, is the acknowledged doctrine in equity of the courts of this state. The courts have not differed over the question of her capacity in charging her separate estate, where the evidence shows that there was no doubt in regard to her intention to charge it. The difficulty seems to have arisen as to what shall be deemed

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sufficient evidence to establish such intention, and upon this question the court of chancery in England have gone further than the courts of this state. The decisions in England have gone the length of holding, that where the wife unites with her husband in giving such a note or obligation to pay his debt, it shall, without any other evidence of her intention, be charged upon her separate estate, and such is the doctrine of many of the state courts of this country. The court of appeals have said in this very case, such is not the rule with us. They have not decided, however, that where it is shown by extrinsic evidence, that she actually intended to charge her separate estate by signing with her husband for his debt, that she does not charge her separate estate. Such a doctrine cannot be held without denying to her the power in equity of disposing of her separate property—a power which has hitherto been universally conceded to her.

She certainly can be no longer regarded as a *feme sole* in equity, as regards her separate property, if this doctrine is to prevail.

I am of opinion, for the reasons stated, that the judgment of the special term should be affirmed.

PAAKER, J., concurred.

CAMPBELL, J., dissented.

BALCOM, J., took no part in the decision, having been counsel in the case.

SUPREME COURT.

MICHAEL F. KEENAN agt. CHRISTIAN DORFLINGER.

The *lien* of an attorney for his compensation attaches to the *subject matter of the claim*, and exists from the commencement of the action to judgment; and the *taxable costs* are *prima facie* the measure of such compensation.

Keenan agt. Durfinger.

New York Special Term, December, 1859.

THIS was a motion on the part of the defendant for an order of discontinuance without costs, founded upon a consent in writing to that effect signed by the plaintiff. It appeared by the affidavits, that after the report of a referee against the defendant for \$500, the parties to the action met and settled the claim without the knowledge or assent of the attorney, and the plaintiff gave the defendant a general release and a consent to discontinue without costs. It was claimed in support of the motion,

1st. That the right to costs as such does not attach until judgment.

2d. That they are allowances to the party, and not to the attorney.

3d. That the taxable costs are not the measure of compensation for the attorney's services.

4th. That the lien of the attorney as against the defendant does not attach until judgment, and then not for the taxed costs, but for his compensation for his services, which may be more or less than the taxed costs.

It was contended for the plaintiff that the attorney's lien for compensation existed before judgment, and attached to the subject matter of the claim, so that the defendant could not settle with the plaintiff in any way so as to avoid the payment of the taxable costs to the attorney.

MALCOM CAMPBELL, for defendant.

J. S. L. CUMMINS, for plaintiff.

CLERKE, Justice, held that the lien of the attorney for his compensation attached to the claim itself, and existed from the commencement of the action to judgment, and that the taxable costs were *prima facie* the measure of such compensation.

Motion denied as applied for; but an order of discontinuance granted, upon payment of the taxable costs to plaintiff's attorney.

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SUPREME COURT.

THE PEOPLE OF THE STATE OF NEW YORK agt. THE MAYOR, &c., OF THE CITY OF NEW YORK.

The attorney general has authority to bring an action in the name of the People, to restrain a municipal corporation from exercising authority in making a contract, or performing similar acts, not possessed by it under its charter, or by law. An injunction will not be granted to restrain a municipal corporation from passing a resolution—it being a legislative act; but it may be granted to restrain such corporation from carrying into effect a resolution passed by them.

Where the people complain of a municipal corporation that they are about to carry out a resolution adopted by them, to do work without lawful authority, and to the injury of the public, no other persons need be united with the plaintiffs or defendants as *parties* to the action.

“Whenever any work is necessary to be done to complete or perfect a particular job, or any supply is needful for any particular purpose, which work and job is to be undertaken or supply furnished for the corporation (of the city of New York), and the several parts of said work or supply shall together involve the expenditure of more than \$250, the same shall be by contract, under such regulations concerning it as shall be established by ordinance of the common council, unless by a vote of three-fourths of the members elected to each board it should be ordered otherwise.” (Law 1857, ch. 446, § 28.)

Held, that the above clause, “work necessary to be done to complete or perfect a particular job,” &c., cannot include work forming part of a job, which in a contract for the residue of the job, appears to have been intentionally excluded, to be let in future, or to be otherwise done. It was doubtless intended for cases of work omitted in a contract from inadvertence, or the necessity of which to complete a job, was unforeseen when the contract was made.

When by a proper construction the contract made by the corporation does not embrace work claimed by them to come within it.

New York Special Term, December, 1859.

MOTION for an injunction, to restrain the defendants from making or carrying into effect a certain contract made with Fairchild, Walker & Co., for the construction of the gate houses of the Croton reservoir. The facts will sufficiently appear in the following opinion:

LYMAN TREMAIN, attorney general, for motion.

RICHARD BUSTEED, corporation counsel, opposed.

People agt. Mayor, &c., of New York.

T. R. STRONG, Justice. It is apparent from the opinion of Justice INGRAHAM, on the decision of the motion made before him in this case, at special term, for an injunction, and I have also learned from conversation with him on the subject, that he intended to decide for the purpose of the motion, that the attorney general has authority to bring an action in the name of the people, to restrain a municipal corporation from exercising authority in making a contract, or performing similar acts, not possessed by it under its charter, or by law. He denied the motion in respect to a restraint to that extent in this case, on the ground it did not appear that defendants were about to do the acts of that nature stated in the complaint, except upon information and belief, which was not sufficient. This defect existed in the plaintiff's papers, but it appears to have been supplied by papers introduced by the defendants, and the fact to have escaped the attention of the court. The further papers now produced by the plaintiffs removed this ground of objection.

On this renewal of the motion, in pursuance of the leave given therefor, I shall not examine the question as to the right of the attorney general to bring this action, but shall follow the decision of Justice INGRAHAM on that point, and allow the plaintiffs an injunction if they have made a case in other respects which calls for such an interposition by the court.

The prayer of the complaint is, that the action of the defendants in passing a resolution directing the Croton aqueduct board to have the gate houses, aqueduct, and their appurtenances, for the new reservoir, constructed by Fairchild, Walker & Co., under the contract made with them the 2d of April, 1858, &c., be adjudged to be without authority and a usurpation of power; and that the defendants be enjoined from passing the resolution or any resolution directing the work to be done by those persons, or any person, except the same be awarded in the ordinary way

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upon sealed bids made in pursuance of notice; that the defendants also be enjoined from employing said persons or any person, to construct said work; and the defendants be prohibited from carrying out the provisions of said resolution. It is set forth in the complaint, that the resolution had been passed by the board of councilmen and the board of aldermen, that it had been vetoed by the mayor, and re-adopted by the board of councilmen by a vote of 16 to 3, and that the same was before the board of aldermen for their concurrence. The other papers now before the court, show that the resolution was again passed by the board of aldermen on the 5th of September, 1859, the same day the complaint was verified, two-thirds of all the members elected having voted therefor, whereby it became adopted.

It was held by Justice INGRAHAM, that passing the resolution was a legislative act, and that the defendants could not be enjoined from any legislation they might deem proper; and following that decision, aside from the facts that the resolution has passed and is in force as far as it could be made operative by the defendants, I shall hold that an injunction against the passage of the resolution cannot be granted.

In regard to the residue of the relief sought, that the defendants be enjoined from employing Fairchild, Walker & Co., or any person, to construct the work mentioned in the resolution, and that the defendants be precluded from carrying out the provisions of the resolution, several questions have been raised which must be considered.

The theory of the complaint being, that the defendants are about to carry out the resolution by employing Fairchild, Walker & Co., to do the work without lawful authority, and to the injury of the public, I perceive no reason why any persons should be united with the present plaintiffs or defendants as parties to the action.

Baldwin & Jaycox, to whom as the lowest bidders, in pursuance of due notice inviting proposals, the Croton

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aqueduct board awarded the contract for constructing the gate houses, pipe chamber, and aqueduct, on the 27th of October, 1858, have no right to the work under the award before confirmation of the contract by the defendants. (*Laws 1857, chap. 446, sec. 38, sec. 32. Ordinances of defendants of 1855, sec. 494. The People ex rel. Dinsmore agt. The Croton Aqueduct Board, 16 How., 4.*) But if it were otherwise, and their rights should be infringed, they would have an ample remedy by action. They have not a pretence of claim to an injunction, and nothing is demanded injurious to their interests.

Fairchild, Walker & Co., have no interest, legal or equitable, involved in the litigation. So far as their contract for constructing the reservoir, embraces the work in question, it is not sought to be, and will not be, affected by the result of this action. They will be entitled to perform their contract, and to damages if the contract is violated by the defendants. Their rights under their contract are in no way in question to their prejudice; and they have no rights under the resolution directing the Croton aqueduct board to employ them to do the work specified in it.

It is claimed by the defendants, that they have the power to give this work to Fairchild, Walker & Co., without any letting or contract, by a three-fourths vote, under sec. 38 of the laws of 1857, chap. 446. That section, after providing that all contracts to be made or let by authority of the common council, for work to be done or supplies to be furnished, shall be made by the appropriate heads of departments, under such regulations as shall be established by the common council, proceeds: "whenever any work is necessary to be done to complete or perfect a particular job, or any supply is needful for any particular purpose, which work and job is to be undertaken or supply furnished for the corporation, and the several parts of said work or supply shall together involve the expenditure of more

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than \$250, the same shall be by contract, under such regulations concerning it as shall be established by ordinance of the common council, unless by a vote of three-fourths of the members elected to each board, it should be ordered otherwise." The section next provides that all contracts shall be entered into by the appropriate heads of departments, and shall be founded on sealed bids, &c. Assuming that the contract of Fairchild, Walker & Co., does not embrace the gate houses, &c., I do not think that work can properly be regarded "work necessary to be done to complete or perfect a particular job," &c., within the fair meaning of those words in the section cited. That clause cannot include work forming part of a job which in a contract, for the residue of the job appears to have been intentionally excluded, to be let in future, or to be otherwise done. A contrary construction would to a great extent defeat the policy of the provision, by making its evasion by three-fourths of each board entirely easy. In any case of an extensive work, a small part might be let to the lowest bidder according to the charter, and the residue procured to be done under the clause referred to. The clause was, doubtless, intended for cases of work omitted in a contract from inadvertence, or the necessity of which to complete a job was unforeseen when the contract was made.

Another position of the defendants is, that the work in question is covered by the terms of the contract of Fairchild, Walker & Co., and, therefore, there is no ground for granting an injunction. If the work is within that contract, an injunction against a new employment of those persons and the carrying out of the resolution would certainly be harmless; that fact, however, is not a reason for issuing an injunction. But if the contract of Fairchild, Walker & Co., does not cover that work, the resolution for their employment to do the work was unauthorized, and the carrying out of the resolution by the defendants, or a

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new employment by them of Fairchild, Walker & Co., to do the work, would be illegal. After a careful examination of the contract, and much consideration of the question, I am satisfied that the contract does not by a just and proper construction embrace the entire work of the construction of the gate houses, aqueduct, and their appurtenances; on the contrary I think it apparent on the face of the contract, that this work with the exception of such parts of it as would be performed by doing work plainly and particularly, not in general terms, specified therein, was intended to be excluded from the contract. The 4th and 13th specifications provide for excavations of areas for the foundations of the gate houses, and making excavations for the foundations of the gate houses, pipe vaults, laying pipes, and the aqueduct, &c., of such depths, &c., as the engineer may direct, but, beyond that, I find no provision in terms for building the gate houses by those contractors. The absence of such a provision is strong evidence that it was not intended to bring that work within the contract. In addition to that, the 26th specification clearly contemplates that this work will be done by other persons. The language is, "during the construction of the masonry of the gate houses, pipe vaults, conduit, the laying of pipes and other necessary work, the Croton aqueduct board reserves the control of so much ground as the engineer may deem necessary for the proper accommodation in the construction of such works and of the persons employed on them." General language in the specifications, must be construed in connection with this clause, and so limited in interpretation as to allow the clause an effect in accordance with its obvious meaning.

It is impossible for the court, and the court ought not if it could, upon this motion to decide precisely how far Fairchild, Walker & Co., are entitled under the contract to do work which will be in aid of the construction of the gate houses, and other things mentioned in the 27th speci-

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fication. If the construction of the gate houses, is not committed to those persons by their contract, as I have already expressed the opinion it is not, that is sufficient to call upon the court to prevent by injunction the execution of the resolution of the defendants for giving them the work, and to prevent any new employment by the defendants of those persons to construct the gate houses &c., except by contract founded upon a sealed bid or proposal as provided in section 38 above referred to of the law of 1857; the injunction not however to affect the rights of Fairchild, Walker & Co., to perform, or the right of the defendants to permit performance of the present contract according to its terms.

I think the complaint sufficient as a pleading to warrant the relief demanded to that extent. As a pleading, it sufficiently shows an intention by the defendants, beyond the passing, to carry out or execute the resolution. In regard to a public injury, it shows that according to the bid of Baldwin & Jaycox for the work, there would be a saving to the corporation of New York by letting the work pursuant to the charter, instead of having it done under the contract of Fairchild, Walker & Co., upon a single item of the work of \$16,730.

An undertaking must however be executed on the part of the plaintiffs as a condition of granting the injunction, in such sum, and with such sureties, as shall be approved by the court, on one day's notice to the defendants, and be duly approved and filed.

An injunction is ordered according to this opinion upon such an undertaking being first given within ten days.

Brinton agt. Wood.

NEW YORK SUPERIOR COURT.

JOHN T. BRINTON, sequestrator, &c., of the SAFEGUARD INSURANCE COMPANY agt. FREEMAN Wood and others.

The right of a *sequestrator* of an incorporated company to sue in our courts, and to obtain a judgment, is different from the position of a receiver appointed provisionally to protect the property; and perhaps the right is doubtful.

He has however the right to the interposition of the court by *injunction*, to restrain the defendants from selling at a sacrifice collateral securities assigned to them by the company to secure an indebtedness of the company to them.

Special Term, December, 1859.

THIS case came up on an order that defendants show cause why an injunction granted against them for selling certain collateral securities held by them should not be made perpetual.

The following is the opinion of the court, in which the facts are stated :

CHARLES N. EMERSON, *for plaintiff.*

J. S. SLAUSON, *for defendants.*

HOFFMAN, Justice. The case on the defendants' own showing, is an account adjusted between them and the company, by which it is found indebted to them in the sum of \$14,995.93. For this amount they have received transfers of securities in amount over \$160,000. Such a circumstance, unexplained, would raise a violent presumption of fraud in the whole concern. It is met by statements that these securities are not probably of sufficient value to pay the demands.

Yet in January, 1859, Keeler, then president, presented a list of securities to the comptroller of New York, to the amount of \$271,000, embracing many of those assigned, and made oath that they were owned in good faith, and

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were worth \$140,000, and were, it was believed, first class liens. It is impossible, under such circumstances, to allow a wholesale disposition of these securities, which must result in a ruinous sacrifice. On the other hand, the defendants should be allowed to collect such securities as may be available, either by suit or voluntary payment, giving security if required to account for the avails. Another course would be proper, but for some difficulties growing out of the position of the plaintiff. Unless he should be appointed receiver by this court, I cannot order the securities to be placed in his hands in giving security to pay the defendants what may be due them. His right to sue in our tribunals, and eventually to obtain a judgment, is different from a position as an officer appointed provisionally to protect the property. He must be an officer of this court for such purpose. Whether he can ultimately sustain this suit is a point I do not now pass upon. (17 *Howard U. S. Rep.*, 327.) I am not prepared to say that as to a defendant here, and property here, he cannot.

All that can now be done, as I think, is to retain the injunction, but with it a provision allowing the defendants to apply, whenever so advised, for leave to collect, receive or sue for any specified security of their assignor; or for leave to pay off prior liens and incumbrances, or any of them, or to compromise the same. They may also have liberty to apply for power to select any designated number of such securities, and to proceed to the collection thereof, giving security to abide the order of the court respecting the same, or the avails of the same, and surrendering the residue to such person as may be appointed to receive the same. The order to be settled on two days' notice. No cost of this motion to either party.

Cobb agt. Dunkin.

SUPREME COURT.

SARAH E. COBB, for herself and as guardian for others, agt.
GEORGE W. DUNKIN.

Where a complaint alleges specific breaches of specific covenants and conditions in a written agreement or lease, and claims a certain sum as damages on account thereof, the summons should be issued with a notice under the second subdivision of section 129 of the Code,

Consequently, where judgment is taken by default in the case, there must be a proper notice, and assessment of damages. (This reverses the decision in this case at special term, 17 How., 97.)

Monroe General Term, December, 1859.

JOHNSON, WELLES and SMITH, Justices.

APPEAL from a decision at special term, denying a motion to set aside the judgment entered by default in this cause, &c.

An action was commenced in April, 1858, by the plaintiff against the defendant, by the personal service of a summons and complaint; notice in the summons being in pursuance of subdivision 1 of section 129 of the Code. The complaint set forth a lease by the plaintiff to the defendant, dated March 30th, 1857, of a certain farm in the town of Phelps, in the county of Ontario, for the term of one year from the first of April ensuing its date. By the lease, the defendant among other things, agreed to work and till the farm in a good and workmanlike manner in all things, and to deliver the plaintiff one-half of the crops, for the use of the farm. The lease contained a variety of other provisions and covenants of the parties respectively. The complaint also stated that the defendant took possession of the farm under the lease and continued in possession during said term, and undertook the performance of the covenants on his part contained therein.

The breaches assigned were that the defendant did not work or till the farm in a good workmanlike manner, but

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on the contrary neglected the business of cultivating the same, and worked and cultivated the same in a careless, slovenly, and unskillful and unworkmanlike manner. It then proceeded to specify the breaches of the covenants in detail as contained in the lease, which the defendant therein covenanted to observe and fulfill. The complaint then alleged that by reason of the breaches of said covenants by the defendant, she had sustained damages to \$175,—and demanded judgment for that sum, besides costs.

The complaint was duly verified after the action was commenced, and before any answer was put in by the defendant, the parties by an agreement between them, bearing date May 10, 1858, agreed to submit the matters in controversy in the action to the decision of disinterested men, one to be chosen by the plaintiff, and one by the defendant, and they two, when chosen, to select a third. The arbitrators so to be chosen to make their award by the 15th of July, 1858. No arbitrators having been chosen in pursuance of this agreement, the plaintiff discontinued the action, and after the 15th day of July following, commenced this action, the summons in which was personally served on the defendant on the 21st of said month of July, The summons and complaint in both actions were alike.

The defendant not having answered the complaint in this action, nor appeared therein, the plaintiff perfected judgment therein on the 16th day of August, 1858, for the sum of \$175, the amount demanded in the complaint, and being also the amount for which the summons stated the plaintiff would take judgment in case of the defendant's failure to answer, together with costs of the action. There was no assessment of damages by the clerk or by a jury. The defendant swore to merits. The special term denied the motion to set aside the judgment; but allowed the defendant leave to answer on terms. The defendant thereupon appealed to the general term.

Cobb agt. Denkin.

JAMES C. SMITH, *for defendant.*
J. W. STEBBINS, *for plaintiff.*

By the court—E. DARWIN SMITH, Justice. The question presented upon this appeal is simply whether it was regular for the plaintiff to take judgment without having his damages assessed by the clerk or by a jury. The notice in the summons was in the form prescribed in sub-division No. 1 of section 129 of the Code, and judgment was taken for the sum therein demanded. The action is brought, not to recover a specific sum of money due or payable upon an express or implied contract, but to recover damages for the non-performance of the covenants contained in a lease to work and till a farm in a good and workmanlike manner. The question briefly stated is, whether such an action is brought "*for the recovery of money*" within the true intent and meaning of that phrase in subdivision number 1 of section 129, and in section 246 of the Code. Upon this question there has been quite a contrariety of opinion, not only among my brethren in this district but among other judges of this court. The first case which is reported from this district is *Clor agt. Mallory*, (1 *Code Reporter*, 126,) in which my brother JOHNSON held that "the language referred to in subdivision number 1 of said section 129, was intended to apply to actions upon promissory notes, bonds and other contracts for the payment of money upon their face, and not to the large class of actions for the recovery of damages merely on account of the non-performance of some stipulation or duty other than for the payment of a sum of money due, although money only was sought to be recovered." The same view of these sections in effect was taken by my brother STRONG, in *Johnson agt. Paul*, (14 *Howard*, 454). The action in that case was to recover damages for the breach of a written agreement to convey to the plaintiff a farm and personal property. My brother STRONG held that proof should be made of the

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actual damages, before judgment. In opposition to these views is the opinion of my brother WELLES in this case, reported in 17 *Howard Pr. R.*, 97, holding that the plaintiff was regular in taking judgment for the amount mentioned in the summons and demanded in the complaint, and without of course any assessment of damages, in which the learned judge refers to *Cook agt. Pomeroy*, (10 *Howard*, 103,) also decided by him at special term.

It will thus be seen that all my brethren are upon the record on this question in separate opinions, at special term, and as they do not agree, it is obviously necessary and proper that the point be decided at general term. I have no doubt that the opinions, above referred to, by my brothers JOHNSON and STRONG contain the true exposition of the sections of the Code referred to; but, independently of these opinions, I think the point should be deemed settled by the decision of the general term in the second district, in *Tuttle agt. Smith*, (14 *Howard*, 395,) where the question is very carefully considered. It is a simple question of practice, and when such a question is distinctly and fairly decided at a general term, I think the decision should ordinarily be followed.

It is with many questions of practice really a matter of more consequence to the public that they be *settled* and be at rest, and that there be uniformity of proceeding throughout the State, than *how* they are in fact settled. If there be errors of any practical consequence in any such case the legislature will speedily apply a remedy.

I think therefore that the order of the special term should be reversed and the judgment set aside; with leave to the defendant to answer in ten days after service of a copy of the order.

Judgment set aside.

WELLES, J., dissenting.

Knight agt. Schell.

UNITED STATES CIRCUIT COURT.

KNIGHT and others agt. SCHELL, collector, &c.

"*Barrels*" manufactured in this country and sent to Cuba, and there filled with molasses and brought back to our ports, are not liable to duty.

The fact of their being filled with molasses on their return does not destroy their character of "growth or manufacture of this country," nor that they are not "*in the same condition*,"—they are *barrels* still, whether filled with well-water or molasses from Cuba.

Where the usual oath was offered to be made by the importer that the article was the growth and manufacture of this country, as prescribed by the act of Congress, and was waived by the *deputy collector*, as being unnecessary and useless, the duty being claimed on another ground,

Held, that it was only in case that the collector conceded that the article was entitled to entry duty free, so as to leave only the fact of the American character of the article to be established that the oath could be material or required by the collector,

Held, also, that the collector is estopped to set up the omission to make the oath as a defence, where it has been waived by his *deputy*; being bound by the acts of the latter.

New York, June, 1860.

THIS was an action brought to recover back money that had been paid by the plaintiffs upon a large number of barrels containing divers shipments of molasses from the island of Cuba. The barrels had been manufactured by the plaintiffs and sent out to Cuba, and there filled with molasses and brought back to this port. The collector claimed duty upon the barrels at the rate of 24 per centum upon their value, as well as upon the molasses contained in them. The plaintiffs objected to pay the duty on the barrels, claiming that they were "the growth or manufacture of this country," and that they were returned "*in the same condition*" in which they were exported. The collector insisted that they were not returned "*in the same condition*"—that they were sent out *empty* and brought back *filled*—and that their condition was thereby changed, and therefore refused to admit them to entry, duty free.

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The plaintiffs thereupon paid the duty under protest and appealed from the decision of the collector to the secretary of the treasury. The collector's decision being affirmed by the secretary of the treasury, the plaintiffs, within the time prescribed by law, brought this action.

It appeared from the testimony, that the plaintiffs at the time of the entry, by way of proving that the barrels were American produce and manufacture, offered to the deputy collector a certificate of the American Consul at Cuba, to the effect that the barrels in question had been brought to that port in an American vessel and there filled with molasses, and that such barrels were not the product or manufacture of Cuba. The plaintiffs also offered to make the usual oath that the barrels were the growth and manufacture of this country, as prescribed by the act of congress, but that the deputy collector replied in substance that such oath and certificate were useless; that the barrels having been exported empty and brought back filled, their condition was thereby changed, and that they were for that reason dutiable; that such was the decision of the secretary of the treasury, and that duty must therefore be paid, and at the same time handed to the plaintiffs a written direction from the treasury department to that effect.

I. T. WILLIAMS, *for the plaintiffs.*

JUDGE ROOSEVELT and Mr. HUNT, *for the defendants.*

The district attorney contended that the oath being required by the act of congress, could not be waived by the collector; and for a stronger reason could not be waived by his deputy—and that the omission was fatal to the plaintiffs' recovery.

The court, SMALLEY, D. J., held that it was only in case that the collector conceded that the article was entitled to entry duty free, so as to leave only the fact of the Ameri-

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can character of the article to be established, that the oath could be material for any purpose, or could be required by the collector—that when the collector denied free entry to the article on some ground that conceded its commercial character, the oath would be an idle ceremony.

The court further *held* that the collector was estopped to set up the omission to make the oath as a defence; his deputy having given the plaintiffs to understand at the time that it was not necessary, and that the collector was bound by the acts of his deputy.

Upon the question as to whether the barrels were returned "in the same condition" as when exported, the court *held* that the filling them with molasses did not change their condition within the meaning of the act.

The court thereupon charged the jury to inquire:

1. Whether the barrels imported were the same identical barrels that had been manufactured by the plaintiffs and exported by them.

2. Did the deputy collector give the plaintiffs to understand that the oath of identity was waived, and would not be required, and put his refusal to admit them to entry duty free upon grounds other than the want of such oath. That if they find both of these questions in the affirmative they would find for the plaintiffs the sum so paid as duty upon the barrels.

The jury, without leaving their seats, found a verdict for the plaintiffs.

People agt. Stout.

SUPREME COURT.

THE PEOPLE *ex rel.* NATHAN C. PLATT agt. ANDREW V. STOUT.

Where the right to *remove* a public officer is vested by legislative or constitutional enactment in a particular person or body, *for cause*, or upon notice to the incumbent, and no right of appeal or review has been expressly given by law, this court has no power or authority to inquire into the discretion exercised by such person or body, or in any manner to review such removal,

Therefore, the authority of removal of the *chamberlain* of the city of New York, being, by the charter conferred upon the mayor and a majority of the board of aldermen, the exercise of this authority is of a *discretionary* or *judicial* nature, and is not the subject of *examination* or *review* by any other tribunal, either in respect to the *cause*, or its sufficiency, or existence, or in *any respect* whatever.

New York General Term, June, 1860.

SUTHERLAND, LEONARD and BOCKES, *Justices.*

APPEAL from judgment at special term sustaining (*pro forma*) the right of the defendant to the office of chamberlain of the city of New York.

D. DUDLEY FIELD, *for relator.*

WM. CURTIS NOYES, WM. M. EVARTS and JAS. T. BRADY,
for defendant.

By the court—LEONARD, Justice. This is an action in the nature of a *quo warranto*, to oust and exclude Mr. Stout from the office of chamberlain of the city of New York, which, it is alleged he withholds, after removal by lawful authority, from Mr. Platt, who has been legally appointed, and has duly qualified.

The cause assigned for the removal of Mr. Stout was, that he had refused to pay interest on the funds of the city, in his hands by virtue of his office. The mode of removal was by the mayor, with the consent of a majority of the board of aldermen.

Mr. Stout insists that he was not required to pay interest by the ordinances; that he was never notified of any

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charge against him in his official capacity; that no opportunity was afforded him to be heard in his defence; and that his removal was, in fact, without any legal cause, and is for these reasons wholly ineffectual for the purpose intended.

These questions came up on demurrer to the defendant's answer, and the pleadings are so arranged that every allegation of fact on either side is admitted.

The right of removal, except for legal and sufficient cause, whether such cause, in fact, existed at the time of the removal and was assigned therefor, and the authority of the court to examine into or consider the manner in which the power of removal by the mayor and aldermen has been exercised, are questions that have been argued before us with great learning and ability, and which we are now to decide.

We have given to this case all the time and examination which the brief interval since the argument, and other daily engagements have permitted, and we are now prepared to announce our decision, as we think correctly; we shall, however, necessarily omit any extended discussion or review of the subject.

The city charter, passed in 1857, provides (§ 19,) that the heads of departments shall be appointed by the mayor, with the advice and consent of the board of aldermen. Section 21 provides, that the mayor shall have the power to suspend, for cause, during any recess of the common council, and by and with the consent of the board of aldermen, to remove any of the heads of departments, except the comptroller and counsel to the corporation. * * * That the board of aldermen shall have power, without the consent of the mayor, by a vote of two-thirds of all the members elected, to remove any of the heads of departments, for cause, except the comptroller and counsel to the corporation. * * * That the chamberlain shall be appointed by the mayor, with the consent of the board of

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aldermen, and may be removed in the same manner with the heads of departments.

Referring to the debates in the conventions which framed the constitutions of 1821 and of 1846, we find that where the power of removal has been conferred, for causes to be publicly assigned by those in whom the power has been vested, that the responsibility to the people, it was considered would be a sufficient guard against an improper exercise of this power. It appears not to have been contemplated that any review should be had of its exercise.

We have examined, with considerable care, to find any adjudicated case where the courts have exercised the power to review the removal of an officer in a case where the right to remove was vested, by legislative or constitutional enactment, in a particular person or body, for cause or upon notice to the incumbent, but have been unable to meet with such a case.

The mayor and the board of aldermen were not acting in a ministerial capacity in performing the act here complained of.

The cases are numerous which hold that where a discretion is vested in any inferior jurisdiction, and that discretion has been exercised, a *mandamus* will not be granted, because the court cannot control, and ought not to coerce, that discretion.

The application of the principles, decided in analogous cases arising on *mandamus*, are, as I conceive, in point here. The remedy by *mandamus* is not the proper one here, because Mr. Stout is now in office by color of right, (*The People agt. The Corporation of New York*, 3 Johns. Cases, 79;) but that does not afford any reason why the principles decided in cases arising on *mandamus* are not good as authority in actions of *quo warranto*, if analogous. *People agt. The Supervisors*, (12 How. Pr. R., 204.) The supervisors were authorised by law "to examine, settle, and allow, all accounts against their respective counties."

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They disallowed a part of the demand of the relator (who was a marshal for taking the census,) after having audited the account.

The court held, that the law conferred on the supervisors the exercise of judicial functions, and that it was not reviewable by *mandamus*. *The People ex rel. Ch. A. Peabody* agt. *The Attorney General*, (13 *How. Pr. R.*, 179.) The Code, (§ 432,) makes it the duty of the attorney general to determine whether, in any particular case, it is proper that an action should be brought to try the right of any claimant to an office. The court refused a *mandamus*, because the exercise of discretion, under that section, by the attorney general was, in its nature, a judicial act, from which there was no appeal, and over which courts have no control. (*Waddell* agt. *The Mayor, &c.*, 8 *Barb. S. C. R.*, 95.) The charter of the city of New York authorized the common council to alter or amend the grade of the streets. It was decided that it was not the province of the supreme court to review the judgment of the common council, or examine into their motives.

Ex parte Johnson, (3 *Cowen's R.*, 381.) This was an application to the county court to remove a justice of the peace for making a false return to a certiorari, and for keeping his office in a grog shop. The authority to remove justices of the peace was vested by the constitution in the county court for causes to be particularly assigned by the judges of that court, and after notice to the party complained of, and an opportunity of being heard in his defence.

The county court denied the application without reference to the merits, and in substance refused to consider the subject at all.

An application was made to the supreme court for a *mandamus* to compel the county court to take cognizance of the matter.

The supreme court decided that the county court held

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a constitutional power, with which they would not interfere. That the county court were the sole judges whether they would notice the charges or not.

The Judges of the Oneida Common Pleas agt. The People, &c., (18 Wm. R.) The court of common pleas certified that the title to land came in question on the trial of a cause which carried costs against the defendant although the recovery was under fifty dollars. The defendant in that action applied to the supreme court for a *mandamus*, directing the common pleas to vacate the order granting costs. The supreme court examined the facts, and declared that the title to land did not come in question, and awarded the *mandamus*. The question was carried before the late court of errors.

The facts were so clear that it seemed indisputable that the common pleas had shown an arbitrary partiality. The court of errors decided unanimously (22 members present,) that the granting or withholding of the certificate was in the discretion of the common pleas, the authority being conferred on them by statute so to do, and that the supreme court had no jurisdiction to review the decision of the court below, certifying that the title to land came in question on the trial. This was a case where the certificate was wholly unfounded in fact. Numerous other cases are referred to, in the various authorities above cited, and also in the authorities referred to on the points of counsel for the appellants, establishing conclusively that where a particular discretion, or authority of a judicial nature has been conferred on an inferior jurisdiction by statute, the exercise of that authority cannot be reviewed in any respect, and the judgment which such jurisdiction may render is conclusive, unless the right of appeal or review has been expressly given by law.

The authorities cited from English reports, by the counsel for the respondent, have also been carefully examined, and without here reviewing them in detail; it is suffi-

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cient to say that the authority to remove officers by the various corporations by which the power was exercised was derived from custom, prescription, or as an incidental power, and, in many instances, where the incumbent had a freehold interest in the office. The existence of the right to make the removal at all, was in many cases a fact necessary to be ascertained, and if the right existed, then, in many cases, to ascertain whether it had been exercised in accordance with the custom.

Where the right has been so derived, the question involved is obviously one of fact, and the exercise of the right of removal was a ministerial power, and therefore subject to judicial review in the courts, where issues for trial can be framed, and evidence produced and examined.

From our examination of the case, without further reference to the language of the section of the statute from which the power of removal in this case is derived, we hold that the authority of removal is conferred by law upon the mayor and a majority of the board of aldermen, and that the exercise of this authority is of a discretionary or judicial nature, and is not the subject of examination or review by any other tribunal, either in respect to the cause, or its sufficiency, or existence, or in any respect whatever.

There must be some termination to the exercise of discretion; and it does not appear, as a principle, to be an unreasonable or extraordinary thing for the legislature to have conferred such discretion upon the mayor and a majority of the board of aldermen.

If the courts are to control the exercise of the power of removal in such case, then the removal is not by the mayor with the consent of a majority of the board of aldermen, but the consent of the judges of the supreme court must also be obtained, where the parties interested choose to invoke the action of the court.

We have also been referred to an act of the legislature, passed April 7th, 1860, directing the deposit of the public

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moneys by the chamberlain, and, as we think, limiting the period of the termination of his office, but not affecting the tenure of it, except in case the power of removal shall not have been exercised. The power of removal remains unaffected by the act.

The judgment of the special term, upholding the right of the defendant to the office of chamberlain, must be reversed, and judgment must be entered for the plaintiffs according to the prayer of the complaint.

SUTHERLAND, Justice. This is an action in the nature of *quo warranto*, in which the plaintiff, Mr. Platt, claims that he is entitled to the office of chamberlain of this city, that he ought to be put into it, that the defendant, Mr. Stout, is not entitled to it, and that he ought to be ousted. The complaint states various facts to show Mr. Platt's title to the office, and to show that Mr. Stout had been legally and duly removed from the office. The answer states various facts to show that Stout had not been legally removed. The plaintiff demurs to this answer.

The questions are as to the title of Mr. Platt to the office, his right to be put into it, and whether Mr. Stout has been legally and duly removed from it. It is conceded, and no question is made, that if Mr. Stout has been duly and legally removed, Mr. Platt has been duly and legally appointed. So that the only question in the case is as to the legality of the removal on the facts presented by the demurrer. Judgment *pro forma* at special term, was entered in favor of Mr. Stout on this demurrer. The court are unanimously of opinion that the judgment at special term for the defendant on the demurrer must be reversed, and that the plaintiff should have judgment on the demurrer, and that the said Platt is entitled to the said office, and that he be admitted to the same, and that the said defendant is not entitled to the same.

The grounds of this decision are briefly these: The main and important question is whether this court has any

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jurisdiction over, or right to control the exercise of the power of removal vested by the 21st section of the charter of 1857 in the mayor and the board of aldermen, or in the board of aldermen, by a two-third vote of all the members elected; or whether the legislature by the charter intended to vest in the mayor and board of aldermen, or in the board of aldermen alone by a two-third vote, the *discretionary* power of removal? If the right and power of removal is *discretionary*, this court has no jurisdiction over, or right or power to control its exercise, except to see that it has been exercised in the form prescribed by the law creating and vesting the power. It may be laid down as a general proposition, abundantly supported by authority, and as the result of our political or governmental institutions, which operate by a delegation of political or governmental powers to various tribunals, officers and agents, that when the constitution, or the legislature by a law authorized by the constitution, vests a *discretionary* or judicial power in any particular inferior tribunal or officer; that this court has no other or further jurisdiction or control over the exercise of such power by such inferior tribunal or officer, than to see that such inferior tribunal or officer, on the occasion of its exercise, had jurisdiction over the subject matter of its exercise—that is, that the occasion or circumstances contemplated by the constitution or the act for its exercise had occurred—and that the power has been exercised in the form prescribed by the constitution or the act.

The case *ex parte Johnson*, (3 Cowen, 371,) may be referred to, to illustrate what we mean. In that case, by the constitution of 1821, the county court had power to remove any justice of the peace for cause to be assigned by said court, such justice having a copy of the charges served upon him and an opportunity to answer. One P. B. Johnson presented a verified petition to the county court, stating that a certain justice of the peace, had made a false return to a certiorari, willfully and knowingly, and also held his

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court in a grog-shop or a drinking shop, an improper place, and asked for the removal of the justice. The county court refused to consider the question, and an application was made to the supreme court for a *mandamus*, and the court say that the constitution vests in the county court discretionary power over the whole subject, and had made them the sole judges, whether they should listen to the charges preferred. The court say we will not interfere in any manner; we have no right to interfere. A case, not cited I believe, by either of the counsel on the argument, *Commonwealth*, agt. *Pike Beneficial Society*, (8 *Watts & Sergeant's Pennsylvania Reports*, 247,) may be referred to as explaining the grounds upon which we rest our decision.

Now, whether any power not thus expressly given by the constitution or by the legislature, but judicially inferred or determined as existing, as a mere incident of the powers expressly conferred, can be called or considered a discretionary power we are not called upon to decide. The power granted here is express. The cases cited by the counsel for the defendant, are most of them cases where this power has been inferred. No case has been cited to show that such a power expressly given, was not discretionary. Now with regard to this incidental power, we make this suggestion: Would the courts ever infer or imply a power which they could not direct or control? The very fact that the courts would imply the power, would appear to imply that they would and must direct it. Will the court imply discretionary power not subject to its direction and control?

Now, the question in this case arises on the 21st section of the charter of 1857. If I understand my associates, and I believe I do upon this point, we think it is not necessary to pass upon the question whether the words "for cause" in the section granting the power to the mayor to suspend, and with the consent of the board of aldermen to remove, qualify merely the power to suspend,

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or qualify also, the power to remove. Concede that they so qualify the whole, so that it shall read, "that the mayor shall have power to suspend for cause, and by and with the consent of the board of aldermen to remove for cause;" concede that to be the language, the cause not being defined or designated, by the statute, the whole subject is left to the discretion of the mayor and the board of aldermen, except in this, that we are judicially to determine whether the board of aldermen have consented; that, of course, is a judicial question. Perhaps we may say the exercise of the power is, so far, the subject of judicial review, as that a cause or some cause must or should be assigned for the exercise of the power. We might go so far as to say that this court should see that they assign a cause. But in this case, we have no control, nor can we adjudicate upon the sufficiency or goodness of the cause, because the statute does not designate any cause, and there is no standard, or rule, or definition, by or according to which one can determine the assigned cause to be good or sufficient. The construction which would give us the power to judge the goodness or sufficiency of the cause assigned, in the absence of any specification by the legislature, would virtually give to this court the power of removal, and the legislature will have committed it in effect, not to the mayor and aldermen, but to the supreme court. A discretionary power which can be controlled by the court is virtually given to the court, because the parties interested may always resort to the court. If this statute had said that the mayor and the board of aldermen might remove for dereliction of official duty, then they could adjudicate upon the question whether the chamberlain was removed for that cause. We may even go so far as to say, if the law had been that he should continue in office during good behavior, and should be removed for misbehavior, that it must be a question whether the removal was for misbehavior within the meaning of the act.

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But this statute says for cause, without the designation or specification of any cause whatever. The result must be that the legislature intended by the act to give, so far as it regards the sufficiency, or goodness, or reasonableness of the cause, the whole discretionary power to the mayor and board of aldermen, or to the board of aldermen acting by a two-third vote, to determine and adjudicate for themselves on those subjects, in view of their responsibility to the public. The question whether the board of aldermen did in fact consent to the removal of the defendant is properly before us, and is one which we have a right to determine? That depends upon the question raised in the case, whether the board of aldermen, subsequent to the abdication of the chair by Mr. Boole, was properly in session so as to pass the resolution? That applies only to the meeting of the 14th of May, when the resolution was first passed. The court are of opinion that this abdication of the chair by Mr. Boole did not deprive the board of aldermen of the right to appoint another chairman. It is hardly necessary to decide even that, because afterwards, on the 31st of May, the board did pass a resolution referring to the action of the 14th of May, and to the doubts which had arisen as to whether the board had then been properly organized, and reaffirming the resolution, and concurring in the removal of Mr. Stout and the appointment of Mr. Platt.

The result is that the judgment must be reversed, as I have stated.

Justice BOCKES concurred.

NOTE.—While this case was pending for argument in the court of appeals at the present June term, and before it was reached on the calendar, Mr. Stout withdrew and relinquished, in a public card, any further prosecution of the case, whereupon Mr. Field, counsel for Mr. Platt, considered that under the stipulation entered into by him with the counsel for Mr. Stout, that an immediate argument of the case should be had in the court of appeals, he was bound to take judgment by default in that court, which was accordingly done.—R.R.P.

Demelt agt. Leonard.

SUPREME COURT.

JULIA DEMELT agt. GEORGE H. LEONARD, and others.

Notices in actions must be signed by the attorney giving them. Where the pretended notice given by the defendant that he would be examined as a witness in his own behalf, (when such notice was required,) was not signed by the defendant or his attorney, but was allowed by the referee,—judgment was reversed for the error.

Broome General Term, May, 1860.

Present, MASON, BALCOM, CAMPBELL and PARKER, Justices.

This action was brought to charge certain real estate situated in the town of Decatur, in the county of Otsego, with the support of the plaintiff, and to compel the defendants to account for the use of the same. The defendant, Leonard, answered the complaint by a general denial of the whole and every part of it. It was then referred to S. H. Grant, Esq., to take and report the evidence to the court. He took the evidence or a part of it; and then the defendant, Leonard, made a settlement with the plaintiff. Leonard subsequently made a motion for leave to make a supplemental answer setting up the settlement—and leave was granted him to do so, on payment of costs, and on condition that he waived all prior defences he had interposed. He accepted the terms and conditions, and interposed a supplemental answer setting up a settlement of the subject matter of the action subsequent to the service of his former answer. The issues made by the supplemental answer were referred to said Grant to hear and determine. They were tried before him in November, 1857. He afterwards found in favor of the defendant Leonard upon said issues; and judgment was entered on his finding dismissing the complaint with costs. The plaintiff appealed from the judgment to the general term of the court.

Dennett agt. Leonard.

E. E. FERRY, *for plaintiff.*

A. BECKER, *for defendant Leonard.*

By the court—BALCOM, Justice. The defendant Leonard was examined as a witness in his own behalf before the referee. At the time the trial was had he could not testify in his own behalf without giving at least ten days previous notice of his intended examination. The paper served, which the referee held was a notice of his intended examination, was not signed by him or his attorney, and was not therefore a notice. It was only a memorandum. It should have been subscribed by his attorney, in order to constitute it a notice. A rule of this court requires notices to be subscribed by the party or his attorney. That notices in actions must be signed by the attorney giving them has been determined at a general term of this court in the 7th district. (*See Yorks agt. Peck*, 17 *How. Pr. Rep.*, 192.) The referee erred in allowing Leonard to testify in his own behalf without any notice being given of his intended examination. This error entitles the plaintiff to a new trial. It is therefore unnecessary to determine whether the decision of the referee is sustained by the evidence. The judgment in the action should be reversed and a new trial granted, costs to abide the event; and either party should have leave to apply for the appointment of a new referee.

Decision accordingly.

Cornell agt. Townsend.

SUPREME COURT.

ALBERT CORNELL and GEORGE V. AMERMAN agt. ISAAC TOWNSEND, and others.

As a general rule, the *assignee of a bond and mortgage* is put upon inquiry, and takes them subject to all the *existing equities* between the *mortgagor* and *mortgagee*, when the latter parts with his interest.

But a case like the present is an exception to that rule. Where by the will two brothers, sons of the testator, were appointed executors, who qualified, and one of them was charged personally with the payment of the debts, in reference solely to the personal estate bequeathed to him, which was sufficient for their payment; and on a sale of his portion of the real estate devised to him by the will, to his brother, co-executor, who gave back a bond and mortgage to secure a portion of the purchase money, upon a fraudulent representation by his brother, the mortgagee, that all the debts of the testator had been paid, and the mortgagee assigned the bond and mortgage to a third person, without notice, for value, and then departed the country; and on a foreclosure of the mortgage by a subsequent bona fide assignee,

Held, that the *mortgagor* could not recoup the payment of the testator's debts made by him, which his brother had neglected to pay, out of the bond and mortgage, and especially after having made a payment upon the bond and mortgage to the assignee.

Seventh District General Term, Rochester, March, 1860.

APPEAL from judgment of special term.

This action was brought by the respondents to foreclose a mortgage. The mortgage was executed by the defendant, Isaac Townsend, to his brother, Gamaliel Townsend, for about \$1200, under the following circumstances: Jonathan Townsend, the ancestor of the two brothers, owned a farm in Tyrone, Schuyler county, N. Y., of about 108 acres, which he devised to his two sons—forty acres to Isaac and the balance to Gamaliel. He also bequeathed a portion of his personal property to his other children, and the balance to his son Gamaliel, and expressly charged *Gamaliel with the payment of his debts*; he also devised the land subject to certain legacies. The two brothers, Isaac and Gamaliel, were appointed executors of the will. The ancestor died in February, 1853, and the executors proved the will and

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qualified, and took possession of the personal property, sold and distributed the same according to the provisions of the will. The personal property received by Gamaliel amounted to about \$400, which he converted to his own use. He never paid any of the ancestor's debts, except a small one.

It was claimed by Isaac, that the ancestor's debts amounted to more than \$500. The judge on the trial, found that the unpaid debts at the date of the mortgage amounted to \$384; that this amount was known to Gamaliel. In August, 1853, Isaac purchased Gamaliel's part of the premises, and gave him the mortgage in question. At the time the purchase was made, Gamaliel fraudulently represented, and assured Isaac that the ancestor's debts were all paid. Isaac not knowing to the contrary confided in the representation made by Gamaliel, and accepted the deed and gave the mortgage in suit, which was subsequently duly assigned, and at the time of the commencement of this suit was owned by the plaintiffs. Gamaliel, soon after the sale, left the country, and Isaac subsequently was compelled to pay the debts.

The conditions of payment in the mortgage were as follows: "One hundred dollars on the first day of December, 1854, and in annual payments thereafter," &c. "But in case of the non-payment of the sum of \$1210, or any part thereof, at the time above limited, &c., then it shall and may be lawful for the said party of the second part, his heirs, &c., to grant, bargain, &c., the said premises at public auction, and execute a deed to the purchaser, &c., pursuant to the statute in such case made and provided," &c. The complaint alleged that "the defendants have failed to comply with the condition of the said mortgage, by omitting to pay the sum of \$100, principal, and \$63.70 interest, which became due December 1, 1857, by reason of which the whole principal, \$910 and interest, &c., is now due, and that there is justly due and owing, &c., the

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principal sum of \$910, with interest," &c. The sum of \$156.47 was paid on the mortgage on the 9th November, 1854, by the defendant, Isaac Townsend, to George Stow, the second assignee, and the plaintiff's assignor, which payment was indorsed on the mortgage; and the further sum of \$177.70 was paid thereon on the first day of December, 1855, and the further sum of \$170.70 was paid thereon on the first day of December, 1856. Judgment of foreclosure and sale was rendered at special term for the whole sum \$1077.21 actually due on the mortgage. The defendant Isaac Townsend excepted, and brought appeal to the general term.

SEELY & WOLCOTT, for defendant, Isaac Townsend.

1. There was gross fraud practiced upon Isaac Townsend, and he clearly had a right of action against Gamaliel. This the judge at special term admits, and we contend, as between Gamaliel and Isaac, the defence against the mortgage was a good one. And we suppose it is well settled that a court of equity will always interpose to prevent one executor from embezzling the funds of the estate, or defrauding his co-executors or the creditors of the testator. (*See 4 John. Ch. R., 562, and cases there cited.*)

2. Assuming that the defence is a good one against Gamaliel, if he had foreclosed the mortgage, we claim that our defence is equally good against the present plaintiffs, unless the defendant has done some act since the execution of the mortgage that estops him from setting up this defence; as it is well settled that the assignee takes the assignment of the mortgage subject to all the equities existing against it at the time of the transfer. (*See 2 John. Ch. R., 441-479; 2 Cowen's R., 246; 2 Paige 202, id. 644, 7 id. 316; 5 Denio, 640.*) The assignee takes only the title of his assignor whatever it may be. (*3 Barb. Ch. R., 647.*) In the case of *James agt. Morey*, (*2 Cowen, 246,*)

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it is said by the court, at page 320; "There is no rule more distinctly settled than this, that the assignee of a mortgage takes it subject to all the equities subsisting between the mortgagor and the mortgagee at the time of the transfer." To give the plaintiffs a better action in this case than the mortgagee, is placing the mortgage upon the footing of negotiable paper. (See *Western Bank* agt. *Sherwood*, 29 Barb. 383.)

3. We submit that the judge erred in deciding that the whole mortgage was actually due, as the mortgage was payable in instalments, and as the judgment is entered in conformity to the decision, we are deprived of the opportunity of paying up the amount due, including the costs, and by that means gaining time; besides the plaintiffs have increased their costs some forty dollars by having an extra allowance on the whole amount of the mortgage.

HULSE & BENNETT, for plaintiffs.

1. By the terms of Jonathan Townsend's will, his debts are not made a charge upon the real estate. (3 Cow. R., 133; 4 Kent Com., 421, and cases in note "A"; 12 Price, 324; 2 Rev. St., 281 to 287.)

2. There was sufficient personal property to pay all the testator's debts.

(a.) It is the duty of the executors to take, and, if necessary, sell, all the personal estate of their testator, whether specifically bequeathed or not, to pay the testator's debts. (2 R. S., 268, 270, § 6, 12 and 13; *Dayton* on *Sur.*, 245, 253, 280, 402, 432; *Williams* on *Exrs.*, 796 and cases, 1149 and cases; *Knight* agt. *Yarborough*, 4 *Randolph*, 566; *McAlister* agt. *Montgomery*, 3 *Haywood*, 94; *Tole* agt. *Hardy*, 6 Cow. R., 339; *Clayton* agt. *Wardell*, 2 *Brad. Sur. R.*, 7.)

(b.) By the terms of this will the debts of the testator were to be paid in preference to any devise or legacy, and the balance of the personal property, after the payment of the debts, Gamaliel was to have.

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(c.) If the personal estate is not applied to the payment of the debts, the executors are liable to the creditors. (*Williams on Exrs.*, 1149 and *cases*; *Tole* agt. *Hardy*, 6 *Cow. R.*, 339; *Dayton on Sur.*, 402.)

1. The proof is conclusive that Isaac Townsend was the mortgagor and Gamaliel the mortgagee, and that they were the duly qualified executors of their father's will.

2. The proof is conclusive that the mortgagee assigned the mortgage to Layton, that Layton assigned to Stow, and Stow to the (plaintiffs) respondents.

(a.) This exception must fail, for the reason that it is taken to the whole of the finding of the justice preceding the exception, and it is a rule that the exception fails if any part of the finding is good. (14 *N. Y. Rep.*, 310; 4 *Sel. Rep.*, 37; 1 *Ker. Rep.*, 416; 2 *Id.*, 313.)

3. It being the legal duty of the executors to pay all their testator's debts, the assignee of a mortgage given by one of them to the other, had the right to assume, without inquiry, that the debts of the estate were all paid; so far, at least, as the real estate mortgaged was concerned. (*See opinion of Judge Johnson, hereto annexed. Dayton on Sur.*, 280.)

4. The appellant ratified the mortgage while in the hands of the second assignee, by making a payment thereon, which payment was endorsed upon the mortgage when assigned to the respondents. (*Lee* agt. *Porter*, 5 *Johns. Ch. R.*, 268.)

5. The representations of Gamaliel to Isaac, do not constitute fraud.

"a." Although such representations were false, and Isaac relied upon them as true, yet, it must further appear that he had a right to rely upon them as true; otherwise, it was his own folly, and the law will not relieve him from the consequences. (2d *Par. on Con.*, 270 *note*.)

"b." Isaac had no right to rely upon Gamaliel's statement; he had the means of ascertaining, and was bound to know whether the debts were paid or not. (5 *Hill's R.*, 303, and *cases*.)

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6. Even if there were equities existing between Isaac and Gamaliel, they have been waived by the subsequent ratification of the mortgage by Isaac, in the hands of the second assignee, and of these respondents, by the payment of the instalments upon the mortgage. (*2d Par. on Con.*, 279, *note T and cases.*)

"a." The instalments were paid on the mortgage, after Isaac had paid the debts.

"b." Isaac is estopped from setting up his claim against the mortgage in question. (*2 Smith's L. C.*, page 647, *and cases 660 and do.*)

7. If the foregoing propositions of the respondents are sound, the subsequent exceptions of the appellant are not well taken.

The court adopted the opinion of the special term; but modified the decree so as to allow the defendant to pay the instalments due, per statute; in other respects the judgment was affirmed with costs. The following opinion was delivered at special term :

JOHNSON, Justice. The debts against the estate were not a charge upon the real estate devised to Gamaliel G. Townsend by the will. They are not made so by the terms of the will, nor is there anything in the will from which it can be inferred that such was the intention of the testator. There was, beyond all dispute, sufficient personal property to pay all the debts, and there was no reason for making any such charge. Gamaliel was charged personally with the payment of the debts in reference solely to the personal estate bequeathed to him, as appears plainly upon the face of the will. There having been personal property sufficient for the payment of all the debts, the land devised could not have been charged in any event. The devisee might possibly have been charged by action in respect of the land devised after the lapse of three years from the granting of letters testamentary.

But I do not regard these considerations of any great

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importance in this case. As some one must suffer from the acts of Gamaliel, ought the loss in equity to fall upon the plaintiffs or the defendant? As a general rule, the assignee of a bond and mortgage is put upon inquiry, and takes them subject to all the existing equities between the mortgagor and mortgagee when the latter parts with his interest. But this rule, like all other general rules, has its exceptions. Undoubtedly, as between the defendant and Gamaliel, the latter was liable for the payment of these debts. He had the assets, and was, by the will under which he took, charged with their payment personally. But it does not follow from this, certainly, that these debts which the defendant has paid should be charged upon this mortgage. The defendant paid the debts as executor. He had, as such executor, the moment he qualified, the right to all the personal estate, until the debts were paid and satisfied. He knew, as the evidence shows, the existence of the principal debts at the decease of the testator, which he subsequently paid. It was his duty to see to their payment, and to know whether they were paid or not at the time he purchased of Gamaliel and gave him the bond and mortgage in question. I think the assignee of the mortgage, knowing that the mortgagor was one of the executors, would have the right to assume, without inquiry, that the debts of the estate were all satisfied—at least, so far as the real estate mortgaged was concerned. In addition to this, the defendant had made a payment upon the mortgage to the second assignee before it was assigned to the plaintiffs, and before any payment became due, which was endorsed, and which was a notice to any subsequent assignee, that the defendant acknowledged the obligation as valid and binding upon him. No question is made but that the plaintiffs are *bona fide* assignees so far as any actual notice is concerned, and for a valuable consideration, and it seems to me that the defendant, situated as he was in reference to the debts of the estate at the time he

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gave the bond and mortgage in question, and having made one payment thereon, to a person who held as assignee before the assignment to the plaintiffs, ought not to be allowed to recoup the debts paid by him out of the bond and mortgage in question. He knew, or might have known, the pecuniary condition of Gamaliel, and ought to have known how the affairs of the estate stood when he purchased the land devised, and gave his obligation, secured by the mortgage, for the purchase price. But having neglected his duty in this respect, he is in the situation of one who has carelessly and negligently put it in the power of Gamaliel to assign the obligations, and thus impose upon innocent third persons, and should bear the loss. And the more especially after having made a payment to the plaintiffs' assignors. I am of opinion, therefore, there is in equity no set-off or charge against the bond and mortgage in question in the hands of the plaintiffs. Consequently the plaintiffs are entitled to the judgment asked for in the complaint.

UNITED STATES CIRCUIT COURT.

CHRISTOPHER BISCHOFF and others agt. HUGH MAXWELL,
Collector, &c.

The collector has no right to exact of the owner of goods a penalty of twenty per cent on their value, for under valuation, under the 8th section of the act of Congress of 1846, where it appears from the oath of the owner on the original invoice, certified by a consul, that the owner was the manufacturer.

Such a case falls within the 17th section of the tariff act of 1842, which imposes a penalty of fifty per cent of the duty.

New York, October, 1859.

THIS suit was brought against the collector, to recover back a penalty of twenty per cent on the value of the

Erratum.

goods for under valuation of silks, entered at the custom house, under the 8th section of the act of 1846. The penalty amounts to \$508.20.

MR. GRISWOLD, *for plaintiffs.*

MR. HUNT, *for defendant.*

NELSON, C. J. The ground upon which the suit is sought to be sustained is, that the goods were imported by the manufacturers, and the case therefore not within the above 8th section, as that is limited to importations of goods purchased. The fact appears from the oath of one of the owners on the original invoice, certified by the consul, that they were the manufacturers, which must have come under the notice of the collector, and of which the appraisers at the customs must be deemed to have been advised. It is also fully confirmed by the evidence on the trial. Protest was duly made against the payment of the penalty, and the exaction, therefore, was not warranted by law, as already decided.

But the case falls within the 17th section of the tariff act of 1842, which imposes a penalty of fifty per cent of the duty. The plaintiffs are therefore entitled only to the amount exacted, after deducting the fifty per cent penalty, with interest. The clerk will settle the amount for which judgment is to be entered, if not agreed on by counsel.

[ERRATUM.]

By a foolish blunder of the AUTHOR, (not of the printer, who usually has to father such mistakes,) in the case of *Mygatt agt. The N. Y. Protection Ins. Co.*, *ante page 61*, (No. 1,) at the end of the opinion it is stated, "Comstock, Davies, Bacon, Clerke and Wright, Judges, were for affirmance." Please read for "affirmance," *reversal*, as the fact was.

Sharp agt. Mayor, &c., of New York.

SUPREME COURT.

JACOB SHARP agt. THE MAYOR, &c., OF NEW YORK.

This court has power to relieve a party to an action pending in it, from a judgment or order obtained against him by reason of the negligence, ignorance, or fraud of his attorney, without any reference to an action against, or to the responsibility of the attorney.

It is only when the courts require of their attorneys and suitors the exercise of entire good faith in the prosecution or defence of actions that they discharge their whole duty to the community.

It is the right of a municipal corporation, by its proper officers, to apply to the court for protection, and it is the duty of the court to grant it, if it is made to appear that the conduct of their counsel is prejudicial to the rights of the city; especially, where the legislature has conferred upon the corporation counsel the management of all civil actions, independent of any directions from its officers.

Under the facts and circumstances shown in this case, *held*, that it was the duty of the corporation counsel, on application to him by the mayor and comptroller of the city of New York, to *appeal* to the general term from the judgment entered for a large amount against the city, upon a report of a referee at special term, and that the subsequent order of the special term, setting aside this judgment on motion of the comptroller, under the statute, was right. (See *s. c.*, 18 *How. Pr. R.*, 97 and 213.)

New York General Term, June, 1860.

SUTHERLAND, MULLIN and LEONARD, Justices.

A ~~WILL~~ by plaintiff from an order of special term, setting aside the judgment entered in this action against the defendants. (Reported 18 *How. Pr. R.*, 97 and 213.)

D. DELEY FIELD, for appellant.

Wm. CURTIS NOYES, for comptroller of the city.

RICH'L BUSTEED and Wm. FULLERTON, for the corporation.

By the court—**MULLIN, Justice.** This court has power to relieve a party to an action pending in it from a judgment or order obtained against him by reason of the negligence, ignorance, or fraud of his attorney.

The rule formerly was, that the party injured by the neglect or misconduct of his attorney was compelled to

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resort for relief to an action against the attorney, unless it was shown that the attorney was insolvent, in which event the court could relieve.

The remedy by action was a mere illusion, even against a solvent attorney, and hence the recent, and, in my opinion, the more just practice is, for the court to relieve the client, without reference to the responsibility of the attorney, when a proper case for granting relief is established.

There is no justice in permitting one party to obtain an undue advantage over another, through the neglect or misconduct of that other's attorney. Courts of law are not to be used by parties in effecting, through the forms of law, the ruin of a party, who has employed an incompetent, negligent, or unworthy attorney.

It is only when the courts require of their attorneys and suitors the exercise of entire good faith in the prosecution or defence of actions that they discharge their whole duty to the community.

In this case, the comptroller of the city made oath that the claim on which the action is based is unfounded and fraudulent, and that a good defence existed and still exists against the same. It further appears, that after the rendition of this large judgment against the city, both the comptroller and the then mayor applied to the corporation counsel to appeal from the judgment, entered on the report of the referee, to the general term, and that he refused.

The legislature had conferred on the department presided over by the corporation counsel the management of all civil actions brought by and against the city. He was not bound, therefore, to conform to the directions of either the mayor or comptroller, nor to follow their advice. Yet, the right conferred upon the corporation counsel did not place him beyond the control and direction of the court, if it appeared that his action, or omission to act, was injurious to the city. It is the right of the city officers to

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apply to the court for protection, and it is the duty of the court to grant it, if it is made to appear that the conduct of their counsel is prejudicial to the rights of the city.

It becomes necessary to inquire into the conduct of the corporation counsel, in order to ascertain whether the rights of the city have been neglected or unfairly yielded in their defence of this action.

I will not go into a history of the case further than to refer to one or two facts which are disclosed by the papers, and which bear on the question under consideration.

The lease obtained by the plaintiff recites the resolution of the common council, on the 16th June, 1852, directing the leasing to plaintiff of the slip at the foot of Wall street, or so much thereof as belongs to the city. The lease, which is dated the first day of July, conforms to the resolution, and uses, in the leasing clause, the very words of the resolution—the same qualifying words are used again in the habendum clause. It is further provided by said lease as follows:

“And it is hereby mutually covenanted and agreed by, and between the parties to these presents, and these presents are upon the express understanding that nothing herein contained shall be taken or construed to operate as a covenant by said parties of the first part, or their successors for possession or quiet enjoyment by said party of the second part, &c., of the said ferry or right to ferriage, nor shall the same be taken or construed to interfere in any manner with any previous grants or rights, made by said parties of the first part * * * * nor to operate further than to grant the possession of the estate, right, title, or interest, which the said parties of the first part may have, or lawfully claim, in said ferry and right to ferriage, by virtue of their charter,” &c.

The plaintiff covenanted to pay to the city \$20,000 per annum rent for the use of said ferry in quarter yearly payments.

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At the time this lease was applied for, one Murray had or claimed the right to a portion of the slip, which rendered the slip useless for the purpose of a ferry. The right of Murray to the portion claimed by him, was established by a judgment of the superior court, and the plaintiff, in order to get the use of the whole slip, rented of Murray his portion of the slip at the annual rent of \$4,000.

In October, 1853, parties owning the whole or some part of the interest of said plaintiff under said lease, applied to the common council to reduce the rent of said slip, and it was reduced to \$5,000 per annum.

This fact was set up in the answer, but without any allegation as to whether the reduction, thus made, was in consideration of the claim of Murray to said slip. And it is certified, by the referee, that no evidence whatever was given on that subject before him.

The gravamen of the plaintiff's action is the misrepresentation made by the agents of the city, and by means of the maps in the street commissioner's office, that the city owned the whole slip, whereas, in truth and in fact, a portion was owned by said Murray.

The referee finds, as matter of fact, that plaintiff was misled in regard to the extent of the city's interest in the slip, and, as matter of law, that the possession of Murray was not notice to the plaintiff of his (Murray's) right.

Without deciding now whether the representations of the agents of the city were binding upon it, so as to give plaintiff a right of action, or whether the possession of Murray was notice to the plaintiff of his (Murray's) rights, or whether the circumstances attending the reduction of the rent was legitimate evidence in the cause, or how far it might operate by way of defence to the action, it seems to me that each and all of the questions were so important, involved in so much doubt, as not only to justify, but to require counsel to take the opinion of the general term upon each and all of them.

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So large a claim should not be submitted to, unless it is based upon such clear principles of right and justice, as to remove any serious doubt as to its validity.

When, therefore, the comptroller and mayor applied to the corporation counsel to appeal from this judgment, it was a request which he was in duty bound to grant.

It seems to me that no reason has been given why a judgment, recovered under these circumstances, should be permitted to stand. I will not assume to say whether the referee was right or wrong in his decisions on the legal questions involved, but I do say that the omission to prove the facts and circumstances attending the reduction of the rent, and the motives and inducements which led to it was a violation of professional duty, which the counsel owed to his client, the city.

I concur with Judge INGRAHAM, in his views as to the constitutionality of the act entitled "an act to enable the supervisors of the city and county of New York to raise money by tax," being chapter —, of laws of 1859. The provisions relating to applications to set aside judgments recovered against the city, are germane to the subject matter of the act, as disclosed in its title, and although the act may apply to judgments, the payment of which are not provided for by the act in question; yet it does properly apply to judgments then and thereafter to be rendered, and thus the constitutional objection is avoided. If any provision in regard to the setting aside of judgments or limiting the powers of the corporation counsel, could be incorporated in the act without coming in conflict with the act, then all its provisions must be deemed to be in force.

I do not deem it necessary, however, to pass upon the constitutional question. The court had and has ample power to protect the city, as it protects all other parties, from the consequences of the misconduct or neglect of their attorneys.

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I am of the opinion, therefore, that the order of special term, setting aside the judgment, was right. It is due to the city that a full and fair opportunity be afforded to it to try the case; but it seems to me that upon the papers in this case, neither the plaintiff nor his counsel is chargeable with any fault in reference to the judgment, and if the city desires to retry the cause, it should pay to the plaintiff the costs of the former action, and of the motion.

When an action has been referred and tried by the referee upon the facts, and a report made by him in the cause, and a new trial is ordered, it is not ordinarily proper to send it back to the same referee, and for very obvious reasons—he has heard and seen the parties and their witnesses, he has formed his estimate of their credibility, and of the force and effect of their evidence, and the defeated party enters upon a new trial before him, with the views and prejudices of the referee all against him. This is a current which the party ought not to be required to struggle against. The parties do not stand equal before the referee. He is not indifferent between them.

No one would think of trying a cause a second time before the same jury, and although an intelligent referee would be less likely to retain or act on his convictions received on the former trial, yet he is but a man, and with the best intentions, he may be unable wholly to lay aside or forget his bias.

For these reasons the practice is becoming quite general to vacate the orders of reference on granting a new trial on the application of either party, and to refer it to a new referee, if the cause is referable, or to retain it in court if it is not.

Whether a referee shall be retained or removed, when a new trial is ordered, is a question addressed to the discretion of the court, and which seems to me is not appealable.

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This action was referable only on consent. When the court saw fit to take the case from the first referee, it could not supply the vacancy, and hence the case must go back upon the calendar, or be deemed and treated an arbitration.

It has not been suggested that this action had been turned into an arbitration by means of the reference; and, if not, the order of the judge at special term, setting aside the order of reference, was regular.

The order appealed from, must be affirmed.

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SUPREME COURT.

BETSEY BERNHARDT, administratrix, &c. agt. THE RENSSLAER AND SARATOGA RAILROAD COMPANY.

Where, in an action for *causing death*, it clearly appears that the death was caused by the negligent act of the deceased, or that his negligence contributed to it, and also, unless it is shown that the defendants or their agents were guilty of negligence, the plaintiff cannot recover.

Negligence is, in all instances, a question of *fact*; and it is only where a question of fact is *entirely free from doubt*, that the court has a right to apply the *law* without the action of the jury; and this rule is equally applicable to the defendant's as to the plaintiff's negligence. And more especially should such a question be submitted to the jury, where some of the matters relied upon to make out negligence depend upon *contradictory testimony*.

Held, in this case, that although the evidence (somewhat contradictory,) is such as to have sustained a verdict in favor of the defendants, if the jury had so found, yet the negative of the question as to the plaintiff, whether culpably negligent or not, was not so clear as to warrant the court to decide thereon as matter of *law*, and to refuse to submit it to the jury. (This decision reverses that at special term, 18 *How. Pr. R.*, 427,—GOULD, J., dissenting.)

Albany General Term, May, 1860.

GOULD, HOGEBOOM and INGRAHAM, Justices.

THIS action was prosecuted to recover damages for the alleged wrongful killing of Gustavus Bernhardt, by the defendants, in November, 1846, by running a locomotive

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engine against him, in the city of Schenectady, producing injuries of which he died. The defendants, by their answer, denied all negligence or improper conduct on their part, and claimed that the injuries were occasioned by the negligence of the deceased. The cause was tried at the Rensselaer circuit, in February, 1859, before Hon. H. Hoerboom, and a jury. At the close of the plaintiff's evidence, the defendants' counsel moved for a non-suit upon the grounds,

1. That no negligence on the part of the defendants had been shown.
2. That the evidence showed that the injuries complained of were occasioned by the carelessness and negligence of the deceased.
3. That the evidence showed that the carelessness and negligence of the deceased contributed in a material degree to the injuries complained of.
4. That it did not appear that the plaintiff was without fault in producing the injuries complained of.

The court overruled the motion, and the defendants' counsel excepted. The jury found a verdict for the plaintiff for \$4,000 damages.

The defendants moved for and obtained a new trial on a case at the Albany special term, December, 1859. (*Reported 18 How. Pr. R., 427.*) From this decision the plaintiff appealed to the general term.

LYMAN TREMAIN, *for appellant.*

W. A. BEACH, *for respondents.*

By the court—INGRAHAM, Justice. The plaintiff recovered a verdict against the defendants for damages for negligently causing the death of Gustavus Bernhardt. At the trial of the cause the judge submitted to the jury the questions of negligence, both in regard to the conduct of the deceased and of the defendants' agents, and the jury found

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on both grounds against the defendants. A case was afterwards made, and the defendants moved for and obtained a new trial at special term.

The grounds upon which the new trial was granted were that the case showed the deceased to be guilty of negligence, and that the defendants' agents were not guilty of negligence in causing the death, and therefore the plaintiff was not entitled to recover.

It must be conceded that under the decisions of our courts, where it clearly appears that the death was caused by the negligent act of the deceased, or that his negligence contributed to it, and also unless it is shown that the defendants' agents were guilty of negligence, the plaintiff could not recover.

It is not strictly necessary in this case to say whether any negligence, even of the slightest character, on the part of the deceased, could overbalance the grossest negligence on the part of the defendants.

The rule in England, as originally laid down by Lord ELLENBOROUGH, in 11 *East.*, 60, was "fault in the defendant, and no want of ordinary care to avoid injury on the part of the person injured, was sufficient to give the plaintiff a cause of action," and the same rule was first adopted in this state, viz: "negligence on the part of the defendants, and ordinary care on the part of the person injured are necessary to sustain the action."

Of late, however, a disposition seems to exist to extend this rule much further than to require ordinary care from the injured party, and to relieve from the exercise of any particular caution railroad companies and their agents, although using carriages and power of motion much more likely to cause serious injury and death than were formerly in use when the rule was originally established.

Instead of making the rule in favor of such corporations, and exposing the citizen to greater risk, while more than ordinary care is required of him, it appears to me

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that the contrary rule should be adopted, where the party injured has used reasonable care to avoid the accident.

Railroad companies, while in the use of machines eminently destructive of life and limb, should at all times be required to use the utmost care to avoid injuring human beings. The rule in admiralty since the application of steam to navigation has been so altered as to throw upon the steam vessel the burden of avoiding vessels using only their sails, and greater care and caution is required of steam vessels, as well because they are more easily controlled, as because they are more dangerous and destructive if collisions take place with them; and yet the rule seems to be tending, in the case of human life, to require more care on the part of the man, and less care on the part of those managing steam engines. To the establishment of such a rule I do not yield my assent.

The question, however, in the present case is, whether there were any facts which justified the submission to the jury of the questions of negligence on the part of the deceased and of the defendants.

As to the deceased, the evidence showed him to have been a stranger. He had just been landed by the cars in a place where rails were running in various directions, on both sides of the platform, and the crossing of some of which must of course have been necessary. The place was crowded with people, the wind blowing a hurricane, his hat blown off, and, in the confusion, he endeavoring to catch it, struck against the engine. Whether or not, under such circumstances, he was guilty of negligence, would depend upon what notice he had of the approach of the engine. A witness, by him, testifies he did not hear the bell ring; and if a person standing there could not hear it, it is not unreasonable to suppose the deceased did not. No man, unless for the purpose of self-destruction, will voluntarily place himself where his life may be taken.

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away, and in this case it seems to me the facts proven, with the doubt as to the deceased being within hearing of the bell of the engine, if it was rung, would make it proper and necessary to submit the question of the plaintiff's negligence to the jury.

The cases cited by the respondents, as authority for their view of the defendants' liability, do not warrant the application of a rule so comprehensive, as is contended for by the counsel.

In *Haning* agt. *The N. Y. and Erie R. R.*, (13 Barb. S. C. Rep., 9,) it appears that the plaintiff drove at a fast rate over the railroad track, where he could not see the approach of the cars, and knew that hourly trains were passing that spot.

In *Brooks* agt. *The Buffalo and Niagara Falls R. R. Co.*, (25 Barb. S. C. R., 600,) the plaintiff was held guilty of negligence, because he drove his carriage upon the railroad track when the cars were in sight, coming towards him, and he stopped his horse upon the track and remained there till the engine struck his wagon; and the case of *Dascomb* agt. *The Buffalo R. R. Co.*, (27 Barb., 221,) is one of a similar character, in which the plaintiff is shown to have driven negligently upon the track while the cars were in sight coming towards him.

In all these cases, however, the rule is stated to be whether by ordinary observation and prudence the danger might have been avoided. In the latter case, the judge says: "The true test of the defendants' liability is, could the injury have been avoided by ordinary care on the plaintiff's part?" And in *Britton* agt. *The Hudson River R. R. Co.*, (18 N. Y. Rep., 248,) Mr. Justice HARRIS admits the rule to be where the negligence of the defendants is proximate and that of the plaintiff is remote, the action may be maintained.

In *Poler* agt. *The New York Central R. R. Co.*, (16 N. Y. Rep., 476,) the evidence showed that the plaintiff's gate

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was out of repair, and that he fastened it in a manner which the judge admitted would have warranted the jury in finding the plaintiff guilty of negligence, and yet, although this evidence was uncontradicted, the court of appeals held that the question of negligence was properly submitted to the jury.

Mr. Judge SELDEN says: "It will be found impossible to define with precision the relative obligations of the parties in this respect, and it would result in most cases in a question (as to negligence) to be addressed to the sound discretion of a jury." So in the present case, although the evidence is such as to have sustained a verdict in favor of the defendants, if the jury had so found, I do not think the negative of the question as to the plaintiff, whether culpably negligent or not, to be so clear as to warrant the court to decide thereon as matter of law, and to refuse to submit it to the jury. And more especially should such a question be submitted to the jury, where some of the matters relied upon to make out negligence depend upon contradictory testimony.

It will not be denied that negligence is in all instances a question of fact, and it is only where a question of fact is entirely free from doubt that the court has a right to apply the law without the action of the jury.

The remarks above made as to the submission of the question as to the plaintiff's negligence apply equally to that as to the defendants'.

It is a question somewhat contradicted in the testimony, whether the bell on the engine was rung, and whether the defendants were justified in the management of the engine being committed to a person whose capacity was to some extent uncertain. It was also a subject of inquiry, whether the person in charge was keeping that strict watch which was required of him in passing through such a crowd, whether his attention was not rather called toward the military company than to the plaintiff, whether the engine

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could not have been stopped if the man in charge had kept a proper look out before doing the injury, and whether, considering the noise and crowd and high wind at the time, the defendants' agents were not required to use more means of giving notice to the persons in danger?

Upon most of these questions there was sufficient evidence to call for the finding of the jury. The evidence does not, in my judgment, present the case in such a manner as to warrant the court to take it from them. There is no conceded state of facts to justify such a course; but, on the contrary, I think it was the duty of the judge to submit these questions to the jury for their decision.

I am of opinion that the order at special term should be reversed, and judgment should be ordered upon the verdict with costs.

HOGEBOOM, J., concurs.

GOULD, J., dissents.

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SUPREME COURT.

MARTHA ERNST, executrix, &c. agt. THE HUDSON RIVER RAILROAD COMPANY.

Where, in an action for causing death, it did not appear whether the judge at the circuit *non-suited* the plaintiff, on the ground that the negligence of the deceased contributed to produce the injury complained of, or upon the ground that the defendants were not guilty of negligence, or both, *Held*, that the evidence in the case was not so clear on either of these grounds, that a verdict for the plaintiff would have been set aside as unwarranted by the evidence, a new trial therefore granted. (GOULD, J., dissenting.)

Albany General Term, March, 1860.

GOULD, HOGEBOOM and PECKHAM, Justices.

THIS is a motion for a new trial, on exceptions. The action was brought to recover damages of the defendants for causing the death of Henry Ernst, deceased. The

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cause was tried at the Rensselaer circuit, in May, 1859, before Mr. Justice GOULD and a jury. The judge declined to submit any question of fact to the jury and directed a non-suit, and ordered the plaintiff's exceptions to be heard in the first instance at the general term.

The following are the controlling facts:

For half a century there has been a public highway leading from Sand Lake to the city of Albany, passing through the village of Bath and over the Hudson river by what is known as the Bath ferry.

The defendants, as is admitted by the pleadings, operate the Troy and Greenbush railroad, which is located on the east bank of the Hudson, and crosses this public highway at Bath. The railroad crosses the highway upon the same level.

This company have a station house at Bath, located east of the railroad track and just north of the highway leading to the ferry, and ordinarily have a flagman stationed at the crossing.

When the accident happened the deceased resided in the eastern part of the county of Rensselaer, some 14 or 15 miles from Bath. His family consisted of a wife, (the plaintiff,) and six daughters.

On the 29th day of December, 1855, the deceased having a pair of horses attached to a sleigh, was passing upon this highway, bound for the city of Albany. On arriving at Bath he stopped at a tavern, about 158 feet east of the railroad track. As the ferry boat was ready to start, and was only waiting for him, the deceased unhitched his team, seated himself on the sleigh bottom, facing the west, and drove at a moderate pace directly towards the boat. Just as he approached the railroad crossing he came in collision with the defendants' train of cars moving south, receiving an injury that caused his death.

The plaintiff's testator was a teamster, and for more than twenty-five years used the road to Albany, crossing at

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the Bath ferry, and very frequently crossed there. On the morning of the accident he went to Bath by the Sand Lake road, from which the cars were visible, if looked for, as far as the Nail Factory, some miles distant, and might be seen nearly all the way from there to the Bath crossing. He stopped at Dearstyne's tavern till the ferry boat was ready to start; he then came out, hurriedly, and drove towards the ferry-boat at a moderate pace—either a walk or a slow trot. He had a two-horse team and an empty sleigh. It was cold weather and he had a shawl about his face. He had no bells on his horses. In going from the tavern to the boat the road is nearly level, or a little ascending, for 158 feet, when it is crossed by the railroad track. For the whole of this distance, except in passing the station-house, a building twelve or 13 feet wide, there is no obstacle to seeing a train approaching from the north. The approach of a train can be heard, without bell or whistle, from one to two miles. The noise of that train had been heard by one Ostrander, some time before deceased left the tavern. When deceased was at the middle of Mineral street, 125 feet from the track, Ostrander, whom he had nearly run into, heard the noise of the coming cars, looked round, and saw them coming.

The cars were moving at the rate of from 30 to 40 miles an hour. Although in a situation to hear, no witness who was examined heard the bell or whistle before the collision. This omission on the part of the engineer in charge of the train attracted the attention of the ferryman at the time of the collision.

Miller, the regular flagman, was absent, and no flagman or other person was present to warn travelers of the approach of the train. The flagman is ordinarily there for the purpose of signaling the train when to stop for passengers.

Shortly before the collision, and as the deceased approached the track, some person on the ferry boat made

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signals and motioned for deceased to come on. At the same time there was other hallooing in the street near the crossing. Other motions were made, one man motioned with his hand waving it towards the east. The bystanders understood the meaning of these signals differently; one thought it meant to keep off, another thought it meant to come on the boat, while others did not understand the meaning at all.

The approach of the train was perceived by several persons near the crossing; some saw it, some heard it. The witnesses did not observe whether the deceased looked up or down the railroad track as he approached the crossing, and it did not appear that he looked in either direction.

The appointment of the plaintiff as executrix of the last will and testament of her deceased husband, was shown in the case.

R. PARMENTER, *for plaintiff.*

T. M. NORTH, *for defendants.*

By the court—HOGEBOOM, Justice. In this case the judge non-suited the plaintiff. The non-suit was moved for on the ground that the negligence of the deceased contributed to produce the injury complained of. It does not appear whether it was granted upon that ground, or upon the ground that the defendants were not guilty of negligence, or both. As the judge refused to submit the case to the jury, it must appear that the evidence in favor of the defendants was so clear on one or the other of these grounds, that a verdict for the plaintiff would have been set aside as unwarranted by the evidence.

If the evidence established the fact that the bell of the engine was rung at the distance required by law, before reaching the crossing, I should incline to sustain the non-suit. The deceased could scarcely have failed to have discovered the approach of the train, if he had looked up the

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track, as he had sufficient time and opportunity to do. There was nothing to obstruct his vision until he got very near the track. There was nothing done by the defendants to mislead or confuse him, unless it was the omission to ring the bell. He sat in the bottom of his sleigh. He was bundled up with a shawl or something else about his face, which very probably affected his hearing. He was not observed to look up or down the track, although he might have done so; he was probably intent upon reaching the ferry boat, which was about to start. The crossing was a much frequented one, with which he was familiar. He drove towards the ferry boat apparently unobservant of or inattentive to the approach of the train, which was both seen and heard by several other persons. These facts go very far towards establishing *prima facie* a want of care on his part, which should defeat the action.

And yet there are one or two circumstances in his favor entitled to consideration on the question of negligence, one I have already casually mentioned, to wit: defendants' omission to ring the bell, except at the moment of collision. I think we must assume upon the present evidence that such was the fact. Persons who were in a situation to hear, and would probably have heard the bell if rung, testify to the fact that they did not hear it. This is, it is true, only negative evidence, and of little weight in comparison with positive evidence to the contrary; but there is no such positive evidence, and I regard it as strong enough to overcome the legal presumption against a violation of duty. This being so, it established a neglect of duty; negligence on the part of the defendants. And it may help to excuse the decedent from the imputation of negligence; for where a bell is required by law to be rung, the object of it is to notify and warn travellers of approaching danger, the traveller has, I think, a right to rely, to some extent at least, upon its being rung. The omission to ring it does not, of course, absolve him from the neces-

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sity of other proper precautions. But if the jury should be satisfied, upon reasonable evidence, that the sound of the bell would have attracted the notice of the decedent, and enabled and caused him to avoid the danger, I am not prepared to say that there was such freedom from negligence on the part of the defendants, and such want of care on the part of the decedent, as defeats the action. And, under the evidence, I think this was a fair question for the jury, and that their verdict either way would not be disturbed.

There is another circumstance which appears to me not without some force in exculpating the decedent, if the jury took a particular view of the case. It is the signals or motions made to Ernst when driving towards the ferry boat. They were intended, doubtless, as warnings not to attempt to cross the railroad; but it is possible he may have understood them as invitations to hasten to the ferry boat, which was about to start across the river. And though it is scarcely probable that he put that construction upon them, I cannot say that a verdict establishing that fact would be without evidence to support it. If he did so understand the signals made to him, then they were calculated to induce him to do just what he did do, and might naturally disarm a prudent person of the suspicion of approaching danger from another quarter.

These considerations have induced me to favor a new trial. I give my entire assent to the proposition that non-suits in this class of cases, involving the question of negligence, are as proper as in any other, and I am quite aware that the sympathies of a jury are naturally inclined to those who suffer from these terrible accidents to such an extent as makes them sometimes forget the rules of law applicable to such questions. At the same time, the law has constituted them the chosen triers of disputed questions of fact, and such questions arise not only where there is a conflict of evidence as to what actually occurred,

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but where there is a real and well-founded doubt as to the legitimate inferences to be drawn as to the existence of certain facts, from certain other facts clearly established by positive evidence. We must assume that in these, as in other cases, jurors will not be guilty of a violation of duty when they receive proper instructions from the court.

On the whole, though with some hesitation, I think the non-suit should be set aside, and a new trial granted with costs to abide the event.

PECKHAM, J., concurred.

GOULD, J., dissented.

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SUPREME COURT.

JAMES McGRATH, administrator, &c. agt. THE HUDSON RIVER RAILROAD COMPANY.

In actions for damages arising from negligence, the plaintiff, to sustain his action, must prove defendants' negligence, and the plaintiff's freedom from any negligence contributing to the injury. *Per Hozenboom, J.*

The facts may be so clear and decided that the inference of negligence is irresistible; but where either the facts or the inference to be drawn from them are in any degree doubtful, the whole matter should be submitted to a jury under proper instructions as to the law. *Per Hozenboom, J.*

In actions for causing death, the doctrine is laid down in general terms that to sustain the action, it must appear that the negligence of the defendants alone caused the injury. If the negligence of the deceased contributed, the action cannot be maintained. The meaning of such negligence, and the different degrees of negligence defined. *Per Peckham, J.*

As the law does not exact of persons passing on or over a public street or thoroughfare, though a railroad may cross it on the same surface, *extreme care or diligence*, it does not deprive the party injured of redress, though he was guilty of slight neglect, which is the absence of extreme care, though that slight neglect contributed to his injury. *Per Peckham, J.*

Held, that the facts, as proved on the trial in this case, upon which the judge, without deciding the question of defendants' negligence, non-suited the plaintiff, on account of negligence alone on the part of the deceased, whom the plaintiff represented, did not authorize the withholding of the case from the jury, as it was in effect saying that there was no aspect of the case in which it could be considered, which would justify a verdict for the plaintiff.

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(GOULD, J., *dissented* in all three of the foregoing cases, holding that in any given case the *facts* being proved, whether those *facts* constitute *carelessness* is a question of *law*, for the *court*; and where *carelessness* on the part of the deceased has been *proved*, the question of *comparative negligence* as between the parties is not open, and cannot, by settled law, be considered; it is therefore useless to give details to show that he or she was *not so very careless as he might have been*, or that the railroad company might have been *more careful than it was*; or that a locomotive is a *dangerous thing to run against*; the conclusion of law being, on the latter fact, that persons must be careful and not run against it.)

Albany General Term, March, 1860.

GOULD, HOGEBOOM and PECKHAM, *Justices.*

THIS action is brought under the act of 1847, as amended by the act of 1849, to recover damages for death caused by the negligence and improper conduct of the defendants and their agents. The cause was tried at the Rensselaer circuit on the 9th day of February, 1857, before Justice GOULD and a jury. The plaintiff was non-suited.

The evidence shows that in June, 1855, the deceased was killed by the cars of defendants, at the city of Troy, while she was in the act of passing on foot the railroad crossing over Fourth street in that city. At that point, the defendants had two tracks, upon one of which, at the time of the injury, a train was passing rapidly south, and one, upon the other and east track, was slowly backing north. The girl was traveling from the south, on the east side of Fourth street, and as the down train passed had reached the middle of the east track, when struck by the backing train and killed. She was about twelve years of age. No whistle was blown or bell rung upon the backing train. The bell on the down train was rung. The flag-man was on the west side of the track, the flag house being on the east side. At the time of the accident, a man was standing on the rear platform of the backing train, but was not at the brake, which was on the east side of the platform, he being on the west side and looking west.

The proof shows that the occurrence took place in the

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south part of the city of Troy, just at the point where the Union railroad leaves Fourth street, passing towards Hill street, as shown on the map attached to the case.

The occurrence took place about 9 o'clock in the forenoon, the weather fine and clear. This road has a double track, and just before a train of cars passed down (south) on the west track while the train that run over the girl was being backed up (north) on the east track. No whistle was sounded or bell rung upon the backing train. The bell and whistle of the down train were both sounded. The backing train was going slower than an ordinary walk. There was at the time a man standing on the platform of the cars, but not at the brake; he was at the west side of the platform and the brake at the east.

But two witnesses were sworn who saw the girl before the occurrence, Nicholas Mahar and Stephen Myers.

Mahar testified: "I first saw the girl after the train on the west track had passed down—had passed me; she was then coming up Fourth street; she was pretty near the flag house, a little beyond the flag house towards the track; she was on the track when I first saw her; she was facing up street; the backing train was within two or three feet of her; I thought she was almost on the rail, so near the rail that she was just stepping on to it; the girl was off the track, outside the track when she was hit; the cars hit her and tumbled her on to the track; I was about twelve yards from her when she was hit, maybe more; I went up to the girl; she was alive when taken from under the cars; was dead when I left."

Myers testified: "I was on Fourth street, east side of the track when I first saw the girl; I was, I should think, between three and four feet from her; she was on the track between the two rails; the cars were between three and four feet of her; I was passing in the same direction she was; I observed the train that was backing up; I had got within three or four feet of it when I observed it; I

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saw the cars and the girl on the track at about the same time; the girl and I were on the east side of Fourth street; the girl was killed near the line of the east sidewalk (Fourth street,) within the railroad track. The gore west of Fourth street is open, no buildings on it; I saw the girl take two steps; she raised her foot and put it down and raised it again; she *appeared to be walking west towards the train going down*; I did not see anything of the girl until about the instant she was struck; I did not see the cars until about the instant they struck her."

Upon this testimony the presiding judge, on motion of the defendants' counsel, non-suited the plaintiff, upon the ground "that the evidence showed the deceased was guilty of negligence which contributed to her death," and refused to allow that question or any of the questions of fact to be submitted to the jury. The plaintiff duly excepted, and the case comes here upon the exceptions taken at the trial.

W. A. BEACH, *for plaintiff.*

T. M. NORTH, *for defendants.*

HOGEBOOM, Justice. In actions for damages arising from negligence, plaintiff must prove defendants' negligence, and plaintiff's freedom from any negligence contributing to the injury.

In this case, the judge, without deciding the question of defendants' negligence, non-suited the plaintiff on account of negligence on the part of the child. He refused to submit the question to the jury as to the latter point, therefore substantially holding that a verdict for the plaintiff would have been set aside as unwarranted by the evidence.

What constitutes negligence is often, perhaps generally, a difficult question to decide. It is determined, for the purposes of a court and jury by an inference of the mind from the facts of the case; and as minds are differently

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constituted, the inferences from a given state of facts will not always be the same. The facts may be so clear and decided that the inference of negligence is irresistible; but where either the facts or the inference to be drawn from them are in any degree doubtful, the better way is to submit the whole matter to a jury, under proper instructions as to the law. This is the more necessary in cases of negligence, because of the great variety of considerations which enter into that question.

The difficulty is increased by the fact that negligence is of different degrees, and because the fact whether negligence is slight, ordinary or gross, depends upon the peculiar circumstances of each case. The same facts might constitute great negligence in one case, which would scarcely amount to slight negligence in another.

Again, negligence, which is nothing more than the want of care,—proper care,—is more or less affected by the conduct or action of the opposing party. It is not always negligence to cross a railroad track at times when a train is not due or cannot be reasonably expected to pass, nor to cross a railroad track without looking for a train when no signal of its approach is given by the ringing of a bell or otherwise.

It may not be negligence, that is a degree of negligence which shall deprive a party of damages, to cross a railroad track immediately after a train has rapidly passed with much noise and ringing of bells, although another train, giving no signal of its approach, may be noiselessly approaching from an opposite direction on a contiguous and parallel track.

Whether such conduct is negligence in this particular case, must depend upon a consideration of all the circumstances, and is a conclusion to be deduced from a careful and prudent examination of all the facts and the legitimate inferences to be drawn therefrom. Ordinarily, therefore, it should be left to a jury to determine, and their

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determination, when founded upon conflicting evidence, or upon the uncertain deductions to be derived from particular facts more or less clearly established, cannot generally be disturbed.

In this case, I am of opinion that if the noise and ringing of bells attending the descending train passing rapidly across a public thoroughfare was so great as not only naturally to attract the attention of a person of ordinary caution, approaching from a nearly opposite direction, but naturally to make such person unaware of the approach of a train coming with very little noise from an opposite direction and giving no signal of its approach, an injury inflicted by the latter train is not the result of negligence practised by the party receiving the injury in such a sense as deprives him or his representatives of an action for the same.

The greatest caution is very properly required of those who propel engines having such vast power of mischief, and while it is the established law that a party whose negligence contributed to the injury cannot recover, this rule, which does not allow the jury to weigh the comparative negligence of the litigating parties, should not be extended so far as to take from the jury the right to determine (except in a very clear and certain case,) whether such negligence has in fact been committed.

The facts presented in this case seem to me of such a character as to require their submission to a jury, upon the demand of either party. Assuming that the deceased is to be held to the same degree of care which is demanded of an adult person, the girl was rightfully on the street; she had a right to cross the railroad track; she was obliged to do so, if her business led her north. A train was just passing to the south with rapidity, the bell ringing and the whistle sounding. It naturally and reasonably attracted her attention. It was possible, though not probable, that nearly at the same moment another train should

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pass in the opposite direction. It was not proper, but negligent, on the part of defendants to allow it so to pass without signalizing its approach; it was reasonable to expect that such warning and notice would be given. If it was not given, I think it was reasonable and prudent to conclude that no other train was approaching, and consequently that there would be no danger in crossing the track. It may be true that extraordinary caution would have demanded that the girl should have looked to the south, as well as to the north and west. I cannot say that it was such negligence not to do so as should defeat the action, if the backing train was proceeding so noiselessly as not naturally to have excited the attention of a prudent person.

I am therefore of opinion that a new trial should be granted, unless there are some adjudications which settle the rule in a contrary direction.

I do not discover, in any of the cases to which reference has been made, any adjudication which forbids the granting of a new trial in this case. The cases unquestionably hold that a non-suit may be granted in cases of this character as in other cases, where the proof is insufficient to maintain the cause of action; that clear proof of negligence on the part of the plaintiff entitles the defendant to demand a non-suit; that where the facts are undisputed, and the inference to be drawn from them clear, and leading only to a single result, the question becomes one of law for a court to determine; that where there is full opportunity for observation, and abundant means for avoiding a collision, such as would occur to and be embraced, by a person of ordinary prudence, the plaintiff is negligent for not embracing them, and that the plaintiff is not relieved from the imputation of negligence unless it is deprived of that character by the defendants' own act or default.

Nevertheless, there are cases so nearly balanced, both as to the facts, and as to the inferences to be derived from

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them, that a court cannot safely against the objection of a party, remove them from the consideration of the triers of questions of fact, and when such a course is taken against the will of a party, it can only be sustained upon the ground that there is no aspect of the case in which it can be considered which would justify a verdict for the plaintiff.

I do not regard this case as of that character, and am therefore of opinion that the non-suit should be set aside and a new trial should be granted, with costs to abide the event.

PECKHAM, Justice. This suit was brought to recover damages alleged to have been caused by the negligence of the defendants, in running their car over deceased and causing her death. The cause was tried at the Rensselaer circuit in 1857.

The deceased, a girl about twelve years of age, was walking in the city of Troy, on the east side of Fourth street, northerly, about mid-day. The track of defendants runs diagonally across Fourth street, in a direction east of north, but not fully north-east. The injury occurred by a train moving slowly backwards, northerly, on the easterly track, and crushing the girl just as she was stepping on the track to pass up the street. Just before the injury, a passenger train had passed on the west track rapidly down, southerly, meeting and passing the backing train at about the middle of Fourth street.

This passenger train made a good deal of noise, its bell was ringing, &c. No bell was rung or signal made on the backing train. Its motion was only about as fast as a man would usually walk. A man was on the north end of the backing train, but whether in the employ of the company or not does not appear. His face was towards the west at the time of the accident. These are the main features in the case, though, as several witnesses testify to the accident, there is some slight difference in their evidence.

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At the close of the evidence, the defendants' counsel moved for a non-suit upon the ground that the evidence showed that the deceased was guilty of negligence which contributed to her death. As to that, the plaintiff's counsel asked to go to the jury, as a question of fact. The court refused to allow the cause to go to the jury, and non-suited the plaintiff. The negligence of the defendants was not denied or disputed.

But one ground was presented for a non-suit, and it is not, therefore, material to consider any other. The sole point here is, did the evidence so clearly prove the deceased guilty of negligence contributing to her injury, that, as matter of mere law, the court should so decide; or was the case on that subject of such a character, as to require its submission to a jury.

The doctrine is laid down in general terms that, to sustain this action, it must appear that the negligence of the defendants alone caused the injury. If the negligence of the deceased contributed, the action cannot be maintained.

What is meant by negligence of the party injured contributing to the injury, in such a case? There are different degrees of negligence or care known to the law. In speaking of the various degrees of care or diligence, Sir William Jones says: "There are infinite shades, from the slightest momentary thought or glance of attention to the most vigilant anxiety and solicitude."

Again, he says: "The care, which every man of common prudence takes of *his own* concerns, is a proper measure to be required, in performing every contract, if there were not strong reasons for *exacting* in some of them a *greater*, and *permitting* in others a *less* degree of attention. If the construction be *favorable* a degree of care less than the standard will be sufficient; if *rigorous*, a degree more will be required." (Jones on *Bailm.*, 5, 6; Ang. on *Law of Carriers*, § 8.)

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The civil and common law make three degrees of negligence.

1. Gross; which consists, according to Sir Wm. Jones, in the omission of that care which even inattentive and thoughtless men never fail to take of their own property. This is regarded as equal to fraud or bad faith.

2. Ordinary neglect, the want of that diligence which the generality of mankind use in their own concerns, that is, of ordinary care.

3. Slight neglect, the omission of that care which very attentive and vigilant persons take of their own goods, or of very exact diligence. (*Jones on Baileys*, 21, 22; *Ang. on Carr.*, §§ 5, 10.)

If the party injured be bound to exercise the greatest care, then no case can be found where an action could be maintained. I think the past has furnished no exception to this position, not even when the railroad is on the same surface with a public road, and occupying a part of it, either for the purpose of crossing or otherwise. If he had looked the other way, or thoroughly in all directions; had gone a little faster or a little slower; if he had stopped and made inquiry as to when the cars were coming to cross the track, he had not been killed. To require the strictest care from them would afford no practical protection to the public, and would, of course, give encouragement and impunity to negligence by the railroads.

While it is important to foster commerce and facilitate intercommunication, there is no reason why either should be done at the expense of human life. I am not aware that it has ever been adjudged by any court, that extreme diligence, or, in the language of Sir William Jones, "very exact diligence" can be required of persons passing on or over a public street or thoroughfare, though a railroad may cross it on the same surface. As the law does not then exact extreme care, it does not deprive the party injured of redress, though he was guilty of slight neglect, which

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is the absence of extreme care, and though that slight neglect contributed to the injury.

It is a sound rule, as to diligence, that the party must proportion his care to the injury likely to accrue to others by any improvidence on his part. "Where the consequences of negligence will probably be serious injury to others, and where the means of avoiding it are completely within the party's power, ordinary care requires almost the utmost degree of human vigilance and foresight." (*Per Johnson, J., Kelsey agt. Barney, 2 Kern., 429-30.*)

This is a sound rule,—healthful in its practical application. People in this country in passing over public roads or streets crossed by railroads, will bestow about so much attention. They desire to save their limbs and lives, and a book filled with statutes of pains and penalties, or disabilities, will not add a particle to their care or precaution.

If the loss of life will not secure caution, forfeiture of property or imprisonment, for having their limbs broken, will be wholly ineffectual. The only way to protect them is to exact great diligence from those who manage and control these powerful and terrible steam engines on railroads. They are capable of avoiding and preventing injuries to persons in such cases, and it is their business, their special business, to do so.

In no country but this are railroads allowed, as a general thing, to cross streets or public highways, with cars propelled by steam, upon the same surface with the street or highway. In every excepted case the crossing place is guarded with a vigilance never exhibited here.

If the railroads here choose to cross streets, upon the same surface, they assume a corresponding responsibility, and must exert a corresponding vigilance. It being the peculiar business of the managers of these steam engines, in view of these increased perils to persons lawfully traveling the streets or highways, to be extremely careful not to

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injure them, they will not be allowed to neglect their business, they must not be inattentive or absent-minded.

Human beings, especially in this country, intent upon and absorbed with their business, their cares, their griefs, or their pleasures, are not always mindful of the perils of these crossings. They are absent-minded sometimes on such occasions, and they cannot be made otherwise; the mind is legitimately engaged on something else. The law then looks to them with more toleration, and "permits in them a less degree of attention." In the language of Sir William Jones, before referred to, "the construction of their conduct is favorable, and a degree of care from them less than the standard will be sufficient." They imperil nothing but their lives; if they run against a steam engine there is little danger of their injuring it.

The great number of lives sacrificed at these crossings should warn courts to be careful, before adjudging, as matter of law, that their negligence was such as justly to forfeit their lives. The care exerted was such as they thought sufficient, such as they trusted their lives upon; and this gave the highest evidence of their sincerity.

In some states in this country, where railroads cross each other, statutes have been passed requiring each train to make a full stop, as it comes to such crossing, before passing over. That, in the judgment of such legislature, is the measure of care which such a case demands.

In my judgment, our courts have gone quite far enough in the direction of holding persons injured to be free from negligence before they can recover. Both principle and sound public policy forbid any extension of the doctrine. It would certainly encourage and promote negligence on the part of the railroad employees; feeling that any want of care by the injured would secure impunity to them, and knowing that no man was ever yet injured at a crossing to whom some want of care could not be imputed, they would naturally and necessarily relax from that keen vigilance

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required from persons in their position. Its extension would secure no greater caution on the part of the public.

I have examined the testimony in this case with some care, and am clearly of opinion it was not a case for a non-suit, on the question of the negligence of the deceased. A train had just passed down with speed and much noise, and in a manner well calculated to attract the attention of deceased; and she would then quite naturally think the track was clear, and not be looking for another train immediately. She was no trespasser; was walking where she had a legal right to go, in a public street; and this train, stealthily, without ringing a bell or giving any notice, approached her under circumstances well calculated to avoid her observation. Her course was northerly, and the train east of north—though not north-east—almost at her back. In my judgment this was a proper case for a jury. Questions of fraud and negligence are peculiarly for them, under proper instructions from the court. Such cases have been so regarded by elementary writers.

"All the preceding rules may be diversified to infinity by the circumstances of every particular case, on which circumstances it is, on the continent, the province of a judge appointed by the sovereign, and in England of a jury, to decide." (*Jones on Bailm.*, 122.) Repeated with approbation in *Ang. on Carriers*, § 16.

STORY, Justice, says: "What is common or ordinary diligence is more a matter of fact than of law. And in every community it must be judged of by the actual state of society, the habits of business, the general usages of life, and the dangers as well as the institutions peculiar to the age." (*Story on Bailm.*, § 11.)

Judge JOHNSON says, in the court of appeals, on this subject: "It by no means follows, because there is no conflict in the testimony, that the court is to decide the issue, as a question of law. The fact of negligence is very seldom established by such direct and positive evidence that

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it can be taken from the jury and pronounced upon as matter of law." (*Ireland agt. Plankroad Company*, 3 Kern., 533.)

In Connecticut, it is held that negligence is so peculiarly a question of fact, that it should be left to the jury, even on a conceded state of facts. (19 Conn. R., 566; *Been agt. The Housatonic R. R. Co.* *Id.*; *Smith and Bates' Am. Railroad cases*, 114. *See also Oldfield agt. The N. Y. and Harlem R. R. Co.*, 14 N. Y. R., 310, a case, in many respects, similar to this. *Hegan agt. Eighth Ave. R. R. Co.*, 15 N. Y. R., 380; *opinion of Paige, J.*; and *see Carlton agt. Bath, 2 Foster*, 559; *Whitney agt. Lee*, 8 Met., 93.)

It was insisted at the bar that the defendants were guilty, in this case, of gross negligence, and therefore that the plaintiff was entitled to recover, though the deceased was guilty of ordinary negligence. As the facts were presented at the circuit, without hearing defendants' evidence, there is, perhaps, some ground to claim that there was evidence of gross negligence in the defendants' agents. I do not propose to examine this point at length. In such a case there are many *dicta* and some authorities favoring the position of plaintiff's counsel. (*Rathbun agt. Payne*, 19 Wend., 401; *Hartfield agt. Roper*, 21 Wend., 615, 19; *Trow agt. The Vermont Cent. R. R. Co.*, 24 Vermont R., 487; *Kembacker agt. The Cleveland, Columbus and Cinn. R. R. Co.*, 3 Ohio R., 172.)

SELDEN, J., says: "What is gross negligence depends upon the particular circumstances of each case." (*Nolton agt. The West. R. R. Co.*, 15 N. Y. R., 449.)

In ordinary cases, negligence, even when gross, is but an omission of duty. It is held, contrary to the text of Sir William Jones, that it is not designed or intentional mischief, though it may be cogent evidence of it. (*Story on Bailm.*, §§ 19, 22; *Gardner agt. Heath*, 3 Den. 236.)

But, in cases where human life is put in jeopardy, any negligence has been held to be gross. Per *CURTIS, J.*, in

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delivering the opinion of the court: "When carriers undertake to convey persons by the powerful but dangerous agency of steam, public policy and safety require that they should be held to the greatest possible care and diligence. And whether the consideration be pecuniary or otherwise, the personal safety of passengers should not be left to the sport of chance, or the negligence of servants. Any negligence, in such cases may well deserve the epithet of gross." (16 *How. U. S. R.*, 469, 474: and see cases there cited of gross negligence; also cases referred to by SELDEN, J., in 15 *N. Y. R.*, 449.)

Is not human life just as sacred outside as inside the cars, and entitled to the same care, when lawfully crossing a public road? (See also *Bird* agt. *Holbrook*, 4 *Bingham*, 628; *Jordon* agt. *Crump*, 8 *M. & W.*, 782,) which hold that a party doing an act on his own land which may endanger human life, though not illegal, as the setting of spring guns, may be responsible for injuries thus sustained, even to a voluntary trespasser. But it is enough, in this case, without passing upon these questions, to say that the learned judge erred in non-suiting the plaintiff. The question of negligence of the deceased, under the evidence, was for the jury; and, for this cause, there must be a new trial, with costs to abide the event.

(Titles of the three preceding causes.)

GOULD, Justice, dissenting. The point in these three cases is a single one, substantially the same in all.

In the third case, the deceased, a child of 12 years of age, was walking near where a railroad crossed the street, and at a place where for over three hundred feet of the sidewalk along which she was going she had been in full sight of a train backing up as slowly as she was walking. For a few seconds, during this time, a down train passed on the parallel track, (further from her than the track on which the up-train was backing up,) passed very rapidly,

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and was entirely away from the place of the injury before the injury happened. The deceased, in broad daylight, and with the backing train directly before her and in plain sight, *stepped on the railroad track directly in front of the car, just as it reached the crossing*, and she was run over and killed; a single truck passing over her.

In the second case, a man, muffled around his neck and ears, seated in the bottom of his sleigh, knowing all about the railroad crossing at that place, without paying *any attention* to the fact whether or not a train was coming, *drove his horses towards the track, so that the locomotive and the horses came together, without the horses having been at all on the track*, (for an engineer to see,) and the team was whirled around sidewise; the man was thrown out and so injured that he died. About one-third of a mile of the railroad was in plain sight, (*if he chose to look*,) for the whole distance after he left the tavern shed, except some fifteen feet of the way. If he did *not see* the road and the coming train, it was because *he did not look*; if he *did see it*, *he took the risk of driving on the track in front of it*. In either event, *he was, beyond all doubt, careless, and contributed by his carelessness to the injury*.

In the first case, the deceased was standing in the day time close by a railroad track, along which a train was moving *very slowly*; as the train came up towards him, he, *without looking to see if a train were coming, steps forward close to the cow-catcher*,—so close that it hits him and throws him down,—and *one wheel* passes over his leg. A single glance along the track, before stepping so near it, would have sufficed to *see* the train, and *keep from under* the cow-catcher. *Failing to take the last step*, he was *safe*; but he *stepped into the danger*.

Now, in each case, carelessness,—a carelessness so decided and plain that there can be no mistake in so calling it; and a carelessness which not only *contributed to*, but was the *sole cause* of, the injury,—was *plainly proved*

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by the plaintiff's witnesses. And where that is proved, there *cannot* be a recovery.

That, in any given case, the *facts* being proved, whether *those facts constitute carelessness* is a question of *law*, for the *court*, is too well settled to admit of debate. And that, where the facts were clearly proved, a verdict for the plaintiff would be *set aside as against evidence*, is as little debateable.

In a case against the Albany pier company, for not keeping (as by statute required,) a timber along the edge of the dock, several inches above the dock's level; whereby it was alleged a team was backed off into the water and lost, it being proved that the teamster *knew* the state of the dock, and yet backed down to the edge with a load so heavy that his team could not control it, this district general term held the plaintiff could not recover—*because* the teamster was, as matter of *law on those facts*, careless.

In *Hyatt agt. Grant*, (this district,) a passenger on board of a steamboat was killed by a vessel which came into collision with the steamboat. It was proved that the steamboat *could* have avoided the collision; and its not doing so, was held *careless*, as matter of *law*, and the plaintiff was *non-suited*. On review, at general term, we held the *principle* of the non-suit clearly right, and that it was *not* necessary to submit that question to *the jury*; though we sent back the case, on the ground that the *deceased* was not careless, or accountable for the carelessness of the steamboat. And we have given other (unreported) decisions, to precisely the same purport.

Neither these decisions, nor any authoritative decisions in the state, leave this point open to the introduction of the question of *comparative negligence*, as between the two parties; and they concede carelessness on the part of the defendant. But no repetition of *all the circumstances of particular reported cases*,—so long as they do *not meet* this

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rule,—can produce anything but confusion as to the decision of the cases before us.

Unless the majority of the court are prepared to say that, in either of these cases, the deceased was *not proved to have been at all careless*, (in a way that contributed to the injury,) it is useless to give details to show that he, or she, *was not so very careless as he might have been*; or that the railroad company might have been much more careful than it was; or that a locomotive is *a dangerous thing to run against*. It *is* dangerous, and *known* to be so; and persons should take care not to run against it.

As I understand the opinions, they contain rather *plausible excuses* for the negligence of the deceased persons, than any *real denial* of its *proved existence*. And they furnish no ground whatever for reversing the decisions already given. I am unable to yield my own strong convictions (as to the true rule of the law,) to the high regard I have for my brethren and their opinions; and I feel constrained to dissent from them in each of the three cases.*

* Since these cases have been decided, the case of *Johnson agt. The Hudson River Railroad Co.*, (20 N. Y. R., 65,) has been published. That case involves the question of the *onus probandi* of negligence by the respective parties. In the opinion of the court, D'ANIO, J., says: "The true rule in my opinion is this: The jury must eventually be satisfied that the plaintiff did not by any negligence of his own contribute to the injury. The evidence to establish this may consist in that offered to show the nature or cause of the accident, or in any other competent proof. To carry a case to the jury, the evidence on the part of the plaintiff must be such as, if believed, would authorize them to find that the injury was occasioned *solely by the negligence of the defendant*. It is not absolutely essential that the plaintiff should give any affirmative proof touching his own conduct on the occasion of the accident. The character of the defendants' delinquency may be such as to prove, *prima facie*, the whole issue, or the case may be such as to make it necessary for the plaintiff to show by independent evidence that he did not bring the misfortune upon himself. No more certain rule can be laid down."

The rule here laid down seems to establish very conclusively that where the proof shows that the plaintiff did "by *any negligence of his own*, contribute to the injury," the court must *non-suit* him—because the evidence is not such as "would authorize the jury to find that the injury was occasioned *solely* by the negligence of the defendant."—*Rep.*

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UNITED STATES DISTRICT COURT.

RUSSELL STURGIS agt. THE STEAMBOAT JOSEPH JOHNSON.

In the matter of *salvage* service, there is no obligation of law, nor custom in the port of New York, requiring *steam tugs* to relieve each other *gratuitously*, when disabled and requiring assistance.

Where the *Joseph Johnson*, a tug employed in towing vessels in and out of New York harbor, came in collision with the schooner *Henrico*, off the Jersey shore below Sandy Hook, by which her smoke pipe was carried away, as well as some of the wheel arms and buckets, and part of the wheel house, and one end of her main shaft thrown out of its bed, her bowsprit broken off and her upper joiner work injured; being disabled from using her steam power, and left in an unnavi-gable condition, and after some twenty-four hours she drifted nearly into deep water and out of control of her anchor,

And the steam tug *Achilles* (of great strength and power) at this time having approached, and, at the request of the men on the *Joseph Johnson*, went to the schooner *Henrico*, (some five miles off,) and took off the master of the *Johnson*, (who had been on board of the schooner from the time of the collision,) and returned and passed a hawser to the *Johnson*, and towed her into New York, occupying some six hours in the whole,

Held, that the state of the *Johnson* was unquestionably one of danger, and constituted the interposition and recovery by the *Achilles* an act of *salvage*; and not one of *towage* merely; but no way attended with circumstances of extraordi-nary merit in personal efforts, or exposure of life or property by the salvors.

That on the facts disclosed \$1000 was an adequate reward for the service rendered.

New York, June, 1860.

THIS was an action brought by the libelant, as the owner of the steam tug *Achilles*, to recover salvage for services rendered to the *Joseph Johnson*. On the 9th of March, 1855, the *Joseph Johnson*, a tug employed in towing ves-sels in and out of New York, and the schooner *Henrico* came in collision off the Jersey shore, below Sandy Hook, by which collision the smoke pipe of the steamboat was carried away, as well as some of the wheel arms and buckets, and part of the wheel house, and one end of her main shaft was thrown out of its bed. Her bowsprit was broken off and her upper joiner work injured. She was disabled from using her steam power, and was left in an unnavi-gable condition. Her master and one of her fire-

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men remained on board the schooner, when the vessels separated after the collision. Both vessels thereupon anchored for the night from half a mile to a mile from the shore. The wind was blowing fresh off shore all night, during which both vessels commenced drifting out to sea, and by nine or ten o'clock on the morning of the 10th, the Johnson had got nearly into deep water and out of the control of her anchor. The schooner's cable had parted, and she had drifted four or five miles further out to sea.

At this time the Achilles, a vessel of great strength and power, built at a cost of about \$46,000, for and employed in the same business as the Johnson, approached her, and asked her if she required assistance. The answer was given that she did; that her master was on board the schooner, and the Achilles was requested to go to the schooner and take him off. This was done in about an hour, and on the return of the Achilles with the master, a hawser was passed from the tug to the Johnson, by which she was taken in tow, and carried to New York in four or five hours from the time the Achilles returned to her, without further loss or damage of consequence to either vessel. There was great conflict of testimony among the twenty-one witnesses examined, as to the state of the wind and weather, the peril of the Johnson, and the difficulties and dangers of the service. The value of the Joseph Johnson was variously estimated at from \$7,000 to \$14,000.

The defence claimed:

1. That the service rendered by the Achilles was one of towage merely.
2. That the reward was limited to \$150 or \$200, by agreement with the officers of the Achilles, provided her owner, when consulted, should require any pay at all; and,
3. That by the usage and custom of the port, steam tugs render gratuitously, aid and assistance in towing each other in case of being disabled or injured in pursuing their business in the port.

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BENEDICT, BURR & BENEDICT, *for libelant.*
BEEBE, DEAN & DONOHUE, *for claimant.*

Held by the court, BETTS, Judge. That according to the clear doctrine of the maritime law, the services rendered in this case were of a salvage character, and that the libelant is entitled to compensation for them upon that principle. (*The Charles Adolph*, 1 *Swabey Ad. R.*, 153; *The ship Raikes*, 1 *Haggard*, 246; *The Meg Merriles*, 3 *Hagg.*, 346; *The Versailles*, 1 *Curtis R.*, 353; *The Independence*, 2 *Id.*, 350; *The Reward*, 1 *W. Rob.*, 174.)

That on the testimony the evidence of the agreement to perform the service for \$150 to \$200 is met and repelled by a superior weight of testimony on the part of the libelant.

That there is no satisfactory foundation in the proofs for the alleged custom in this port, that tugs are bound to relieve each other gratuitously when disabled and requiring assistance. Very probably individual instances exist where the service has been rendered without charge, but no obligation of law is shown which exacts it as a right due to one strange vessel from another. If it assumes in any contingency the aspect of a right or privilege, it is one of imperfect obligation and out of the cognizance of courts of justice.

That the position of the Johnson in sight of the shore, in full daylight, off the mouth of her home port, and in the path of numerous vessels passing in and out of the harbor, many of them devoted to the business of searching for and aiding others requiring assistance, withdrew her from a condition of hopeless destitution. Her hull was sound, and she was in no immediate peril of foundering because of any inability to withstand the ordinary action of the waves. She was only deprived of self-moving power. That the action of the Achilles in going first for the master of the Johnson without any exhibition or apprehension of

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immediate peril to the Johnson, indicates that there was nothing in the case beyond a prompt and skillful application of her capacity to the service. The state of the Johnson was unquestionably one of danger, and constituted the interposition and recovery by the Achilles an act of salvage, but no way attended with circumstances of extraordinary merit in personal efforts or exposure of life or property by the salvors.

That the consideration of the value of a tug constructed for, and actually pursuing this very business cannot be made a controlling element in estimating the value of her services, when she has not been sent for because of that particular quality, nor is that quality shown to have been indispensable to enable her to render the relief she afforded. She is rather to be considered in market, seeking for that class of business with other competitors, upon the recommendation of her superior qualities. When, then, in her ordinary routine of seeking business she undertakes the aid of a crippled vessel, there is no principle of law which entitled her to a *quantum meruit* for the particular service greater than would have been earned by her if worth less than half her cost, provided she would have been, notwithstanding such value, able to perform the work. Had the steamship Vanderbilt or Persia, or Adriatic chanced to have fallen in with the Johnson, and rendered the same assistance as was afforded by the Achilles, no court would measure the amount of compensation to either of those liners, beyond what would be a competent reward to the Achilles for the same service, it being within the scope of her ability to perform that service equally well, and they not having been required to go out specially to render the aid, or sought for to give it because of their extraordinary power and capacity.

That on the facts \$1,000 is an adequate reward for the service as rendered.

Decree in favor of libelant for \$1,000 with costs.

SALTUS agt. GENIN.

NEW YORK SUPERIOR COURT.

FRANCIS H. SALTUS agt. SIDNEY C. GENIN, and others.

An *order* made at special term denying a motion to allow an *amended complaint*, is not *appealable*, where it appears:

1. That the motion did not involve the *merits* of the action, or some part thereof, the merits under the original complaint being materially different from the merits under the amended complaint, the latter, if allowed in part only, rendering those under the original wholly immaterial and no part of the merits; and until the amendment is allowed there is no mode of discovering what the merits would be.
2. And where the proposed *change of the merits* comes within the exclusion of the last case enumerated in section 173 as a substantial change of the claim, an order involving the merits not being included in those which rest in the discretion of the court, this motion being addressed entirely to the discretion of the court; the plaintiff being bound to show an excuse for not having originally prepared his complaint in the proposed new form, and also for laches in his application. (*S. C. 17 How. Pr. R.*, 390, 3 Boww., 639.)
3. That the order does not involve a *substantial right*, because if the plaintiff is able to succeed upon one of the alternative state of facts contained in his amended complaint, he can as well try which is true in two actions as one; a decision against him in the present action merely disposing of one of those alternatives, leaving him to experiment on the other in a new action, which could not be affected by a judgment in the present.

Held, that if this was an appealable order, the opinion of the learned judge who made it, as reported *17 How. Pr. R.*, 390, and 3 Boww., 639, furnishes ample reasons for sustaining it. Besides there is danger in allowing such amendments, where a complaint contains a statement of facts which has been sworn to, and no excuse shown of being in any way misled so as to authorize the plaintiff to swear to facts inconsistent with the former statement.

General Term, June, 1860, before all the justices.

THIS is an appeal from an order made at special term refusing to allow amendment of the complaint after a trial, a hearing at general term upon appeal and a new trial ordered.

The action was commenced in April, 1856, and the issues in it tried in December, 1856. The order for a new trial was made in July, 1858, and the application for leave to amend in March, 1858. (See *17 How. Pr. R.*, 390.)

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ALBERT MATTHEWS, for appellant.

EDWD. P. CLARK and CHARLES TRACY, for respondents.

By the court—ROBERTSON, Justice. I am well satisfied that the order denying leave to amend was not an appealable one. The power to amend by leave of the court is contained in the 173d section of the Code, and the orders from which appeals may be made are enumerated in section 349. If this is appealable at all, it must be under the subdivision of that section as involving the merits of the action, or some part thereof, or affecting a substantial right. This motion did not involve the merits of the action, for until the amendment was allowed and made, there was no mode of discovering what they would be, for the merits of the action as they stood under the previous complaint, charging neglect to buy and sell stock, would be materially different from the merits of an action under the amended complaint, which charges that the defendants either neglected to buy, or else sold for their own benefit, for if the latter alternative turned out to be true, the former would become wholly immaterial, and no part of the merits.

If it be contended, that it was a proposed change of the merits of the action, that would come within the exclusion of the last case enumerated in section 173 as a substantial change of the claim; an order involving the merits does not include those which rest in the discretion of the court, (*St. John agt. West*, 4 *How.*, R., 331,) and the motion for this was addressed entirely to such discretion: the plaintiff, in making it, was bound to show an excuse for not having originally prepared his complaint in the proposed new form, and also for laches in his application; both of these matters were entirely addressed to the discretion of the court, for until lapse of time and consequent proceedings have rendered an application to the

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court necessary, the parties are entitled to amend as matters of course under section 171.

The order under review certainly does not involve a substantial right. If the plaintiff is able to succeed upon one of the alternative state of facts contained in his amended complaint, he can as well try which is true in two actions as one. A decision against him in this case merely disposes of one of those alternatives, leaving him to experiment on the other in a new action, which could not be affected by the judgment in the present one; and the right to the recovery of the money due upon the true state of facts is the substantial right to be affected by an order, from which an appeal lies under the third subdivision of section 349. (*Tallman agt. Hinman*, 10 *How.*, R., 90.)

In *Whitney agt. Waterman* (4 *Howard, Rep.*, 313,) and *Otis agt. Ross*, (8 *Id.*, 195), the parts of the pleading stricken out might have affected the rights of the party, and he had no redress for a wrong judgment except on appeal; the decision of the action upon the pleadings thus expurgated excluded him from any relief in any action or any modification of the relief in the action in which the pleading was amended, except by restoration on appeal of the parts stricken out; nor was the plaintiff barred in this case by the statute of limitations from bringing such other action, although perhaps, even if he were, it would only form an argument addressed to the discretion of the court, and not give a right to appeal not otherwise existing. There is nothing in the character of the action, or the amendment, to take it out of the general rule as laid down in this court. (*Ford agt. David*, 3 *Bosw. Rep.*, 569, 596; *Marble Iron Works agt. Smith*, 4 *Duer Rep.*, 162, or in the supreme court in *Plunkle agt. Vaughan*, 12 *Barb. R.*, 215; *Travers agt. Binger*, 24 *Barb. R.*, 180; *St. John agt. West*, 4 *How. R.*, 331.)

If this were, however, an appealable order, the opinion of the learned judge who made it, as reported in 3 *Bosw.*

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R., 639, and 17 *How. R.*, 390, furnishes ample reasons for sustaining it. The grounds of laches, the unmeritorious character of the application, the defects in the proposed new pleading, and the absence of any prejudice to the plaintiff by refusing the order, are fully set forth, and justify the decision. I might add there is some danger in allowing similar amendments in a case where a complaint contains statements of facts, as sworn to in this case, and no excuse is shown that he did so in consequence of being misled by any apparent but unreal state of facts; it is only alleged that the plaintiff found it necessary to amend his complaint by swearing to facts in the alternative, one of which is necessarily inconsistent with that formerly sworn to in the complaint. The oath required to verify pleadings ought not to be so lightly treated; its sanction is required for every suitor who enters courts of justice, that he may not harass a party defendant by an action for matters for which he will not swear upon knowledge or belief founded on information.

In this case, the plaintiff proposes to conform his belief to the requisitions of the court of the facts necessary to make out a case. The main allegation in the new pleading is put in a form which cannot be verified, or rather which renders the allegation itself true, because it is that of a dilemma, and is wholly independent of either knowledge or information of either the alternative facts assumed by it.

In my view of this case, the order appealed from should not be disturbed; but as I am satisfied no appeal lay from it, the present appeal must be dismissed, with ten dollars costs, to be paid by the appellant.

Armstrong agt. Foote. .

BROOKLYN CITY COURT.

ARMSTRONG agt. FOOTE.

No action can be maintained in a state court for a *tort* committed in the *Brooklyn Navy Yard*,—the state having ceded the exclusive jurisdiction of that place to the United States; the courts of the latter only have jurisdiction of such actions.

June Term, 1860.

MOTION by defendant to dismiss the complaint in this action.

H. A. MOORE and B. D. SILLIMAN, *for defendant.*

J. P. TROY, *for plaintiff.*

CULVER, Judge. This was an action to recover damages for an assault and battery and false imprisonment, committed by the orders of the defendant, on the 4th of April last. It appears that on the day mentioned the plaintiff, who was employed as a laborer in the Brooklyn Navy Yard, was arrested without process by the defendant, who is the executive officer of the yard, and kept in the guard house for about four hours, and until a warrant was procured and an officer came to arrest him for an assault and battery committed on the day previous upon Lieut. Almy, within the yard. On the part of the defence it was asserted that the plaintiff had made threats against Lieut. Almy, and that he was merely detained to prevent him from executing such threats.

It appears that the assault and imprisonment complained of were committed within the Brooklyn Navy Yard. The complaint must be dismissed, on the ground that the state courts have no jurisdiction of actions for *torts* committed within another jurisdiction. The state has ceded the

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exclusive jurisdiction of the place in question to the United States, and no action can be maintained in a state court for a tort committed therein. The action must be brought in the United States courts.

The defendant's motion is granted.

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SUPREME COURT.

THE PEOPLE *ex rel.* PETER P. DEMAREST and THOMAS J.
COLEMAN agt. MORGAN GRAY.

An *insolvent debtor's discharge* obtained under the statute, will be set aside as irregular and unauthorized, for want of jurisdiction where it appears:

1. That the *notice* of the order for creditors to show cause, has been published in the state paper for a period *less than ten weeks*.
2. Where the *notice* of the order to be served upon the creditors, is not signed by the *insolvent* or by any other person; and especially, where the *name of the officer* before whom cause is to be shown is incorrectly stated.

The proof of such advertisement and service of such notice should be affirmatively shown and appear on the face of the proceedings, to give the officer jurisdiction, and cannot be inferred or presumed.

Kings General Term, June, 1860.

MOTION to set aside insolvent debtor's discharge, for irregularity, &c.

By the court—LOTT, Justice. It appears that an order was made by the Hon. SAMUEL D. MORRIS, late county judge of Kings county, requiring the creditors of Morgan Gray, an insolvent debtor, to show cause before him on the 25th day of April, 1859, at his chambers in the city of Brooklyn, why an assignment of the said insolvent's estate should not be made, and he be discharged from his debts, pursuant to the provisions of the statute for the discharge of an insolvent from his debts. Notice of the order was directed by him to be published for ten weeks in the state paper and two other designated papers, and to be served

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on each of the creditors, in person or by mail, as particularly stated in the order. Assuming that the publication of the notice in the Albany Evening Journal was legal, it is shown by the proof of the publication that it was first published therein on the sixteenth day of February, 1859, and although the publication appears to have been made in each of ten successive weeks thereafter, yet the time between the first publication and the day appointed to show cause was only sixty-eight days, being consequently less than ten weeks. This notice was therefore not published for the period required by the order. Such a publication was expressly declared in a proceeding of the same kind to be insufficient—in *Anonymous* (1, *Wendell* 90.) The same rule was applied in reference to a notice of sheriff's sales of real estate, under an execution in *Olcott agt. Robinson*, (20 *Barb. S. P. Rep.*, 148,) and it has been recognized in daily practice in relation to the publication of a summons requiring defendants to appear in suits and notices of various kinds, required to be published in judicial proceedings.

Another objection taken to the proceeding is equally fatal. There was no notice of the order served upon the creditors or any of them. It is true that a paper purporting to be a notice of an order made by the Honorable JOSIAH SUTHERLAND, a justice of the supreme court, requiring the creditors to show cause &c., at his chambers in Brooklyn, on the day designated in the order of judge MORRIS, was served a sufficient time previous to that day, but even that does not appear to have been signed by the insolvent, or by any person whoever. Such a notice was not a compliance with the statute, nor with the order directing its service. It is insisted, however, that this defect was a mere irregularity, and that advantage should have been taken of it on the return day. There might be some color for that position if the only defect had been the omission to sign the notice, provided the name of

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the officer before whom cause was to be shown had been correctly stated; but it has no force, from the fact that the person named as the judge therein was not the officer before whom the proceeding was pending, and had no authority in the matter.

It is also insisted that, as satisfactory proof of the due publication and service of the notice was required to be given to the officer before any other proceedings were had by him, the fact that a discharge was granted is evidence that such proof was furnished, and the matter must be considered *res adjudicata*.

It is sufficient answer to this to say, that it is the object of the present proceeding to renew that adjudication. The ten weeks' advertisement, and the service of the notice on the creditors, were necessary to give the officer jurisdiction to grant the discharge. Till this was done he had no authority to proceed and adjudicate on the rights of the parties to be affected by the proceedings. This principle was decided in the matter of *Underwood*, an insolvent debtor, (3 Com., 59; *Van Slyke* agt. *Sheldon*, 9 *Barb. S. C. Rep.*, 278; and in *Stanton and others* agt. *Ellis*, 16 *Id.*, 319.)

The proof of such advertisement and service should be affirmatively shown and appear on the face of the proceedings, and cannot be inferered or presumed.

This question was fully considered in the last case cited, and it is only necessary to refer to it as a conclusive authority to show that the discharge in question was unauthorized and void.

Judgment must therefore be entered setting the discharge and other proceedings aside, with costs.

Brower agt. The Water Witch.

UNITED STATES CIRCUIT COURT.

JOHN H. BROWER and others agt. THE BRIG WATER WITCH.

WILLIAM H. SHELDON agt. THE SAME.

JOHN CLIFTON agt. A QUANTITY OF COTTON.

Consignees, to whom goods are shipped, and recognized by the master of the vessel as the proper parties to receive it, and to whom it was delivered by him and freight demanded, and who have made advances upon the goods in the usual way, can maintain a suit against the vessel for damages to the goods, although there were no bill of lading executed.

Where a master of a vessel consents to receive goods on board his vessel and carry them to the port of destination, he subjects the vessel to the common law liability of carrier, even if there is no bill of lading or other agreement entered into by the master. But where there is a written agreement fixing the terms upon which the shipment is to be made, the vessel is bound by it.

Where the shipper enters into an agreement repugnant to the terms of a charter party, of which he has no notice, his interests cannot be affected injuriously thereby.

Held, upon the weight of testimony in this case that the cargo of cotton was badly stowed, and that sufficient attention was not paid to the sea water in the vessel, by using the pumps—the cotton being very wet when discharged from the hold of the ship. The vessel held liable for the damages.

Where a libellant insists upon recovering damages to a cargo of cotton in an independent suit, he cannot apply any portion of them by way of abatement in a suit for the recovery of freight on the cotton, although he has set up in his answer to the latter suit such damages by way of abatement. The damages are an entirety.

Where a portion of a cargo of cotton was shipped *on deck*, in violation of a fair inference from the terms of the agreement, and the freight to be paid was the usual rate for cotton *under deck*, held, on a question of right to recover for the full amount of freight, as mentioned in the agreement, the freight of that portion of the cotton carried on deck be reduced to *deck freight*, and at the same time the vessel held responsible for the transportation of it *under deck*.

New York, October, 1859.

THE libels in the first two cases were filed to recover damages for injuries to a cargo of cotton, shipped in the brig *Water Witch*, from Lavacca, on the Bay of Matagorda, Texas, to this port, in May, 1854.

The libellants were the consignees of the cotton. The libel in the third case was filed by the owner of the brig to recover his freight money. A special contract was made between the shipper at Lavacca, and one Mitchell,

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who represented himself as agent of the vessel. She lay at the port of Indianola, situated on the same bay as Lavacca, but several miles distant. The cotton was carried in a lighter from Lavacca to the vessel. After it was delivered from the lighter and received on board the vessel, the master refused to sign the bills of lading, upon the ground that the cotton was not in good order and condition, and pending this dispute he sailed for New York with his cargo. The shipper, on learning that the vessel had sailed without having signed the bills of lading, forwarded the bills unsigned to the consignees named in them, stating the circumstances of the refusal of the master to sign them. The consignees made advances upon the cotton. On the arrival of the vessel at this port, the master notified the consignees to whom the cotton was consigned, and discharged his cargo, but in a very damaged condition. He also demanded his freight from them, the payment of which was refused, and the above suits afterwards instituted by the respective parties.

It is proper to state further, that the brig was under a charter party from the owners to a firm in New Orleans, and that Mitchell, with whom the contract was made for the shipment for the cotton, represented this firm. By this contract, the shipper was to deliver the cotton at Lavacca, to be received on lighters by Mitchell, and placed by him at his expense, on board of the vessel, to be carried to New York for the freight of one and a quarter cents per pound.

This agent also objected to the bills of lading, because they did not contain a stipulation that part of the cotton might be shipped on deck. The shipper refused to admit such a stipulation, as it was not contained in the agreement between the parties, which was in writing.

BENEDICT, BURR & BENEDICT, *for libelants in first two suits.*
BEEBE, DEAN & DONOHUE, *for libelant in third suit.*

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NELSON, C. J. We perceive no well founded objection to the right of the consignees to maintain these suits. They were the persons to whom the cotton was shipped, and were recognized by the master as the proper parties to receive it, and to whom it was delivered by him, and the freight demanded. They had made advances upon it in the usual way, and as between them and the owners for whose benefit the advances were made, they had the same interest in the cotton, as if the bills of lading had been duly executed.

We should have no difficulty in this case in holding the carrier to the common law liability on the shipment of cotton, even if no bill of lading or other agreement had been entered into by the master, as his consent to receive it on board his vessel and carry it to the port of destination subjected the ship to this liability.

But, in addition to this, the agent of the charterers, in whose service the brig was at the time, and who were interested in procuring cargo, entered into a written agreement, fixing the terms upon which the shipment was to be made. The vessel was bound by it, and although it does not contain the stipulations usual in bills of lading, it carries with it by implication the common law obligations of a common carrier.

We lay entirely out of view the charter party between the owner and the firm in New Orleans, as the shipper in this case had no notice of it; and, if therefore, there had been anything in this agreement repugnant to the charter party, it could not be permitted to affect injuriously his interests.

Having disposed of these somewhat technical questions, we come to the main question in the case—and that is, whether or not the damage to the cotton was the natural, if not necessary, effect of its condition at the time of shipment developed in the course of the voyage, or produced by the dangers of the navigation without any fault of the

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ship, or whether all or any part of it is attributable to bad stowage, or absence of proper care and attention on the part of the master?

Some one hundred bales of the cotton were shipped on deck. It had been argued that the right thus to ship it is fairly to be inferred from the terms of the agreement between the shipper and the agent of the vessel. We think not. It is, also, argued that there was a usage of the trade between the ports of Texas and New York, in the shipment of cotton which justified the master in shipping it on deck. We think that the proof fails altogether to establish any such usage. The freight to be paid was the usual rate for cotton under deck.

It has further been strongly argued, that the whole damage to the cotton as disclosed on discharging it at this port, was the effect of the country damage existing at the time of the shipment, or was produced by a storm which the vessel encountered in the voyage. The evidence in the case is very conflicting upon these questions, and difficult, indeed impossible to be reconciled. The court below came to the conclusion that, according to the weight of it, the cotton had sustained sea damage, for which the vessel was responsible. We are inclined to concur in this conclusion. The testimony is pretty strong that the cotton was badly stowed, and, also, that sufficient attention was not paid to the sea water in the hold of the vessel by using the pumps. The cotton was very wet when discharged from the hold of the ship.

The court below, in the case of the libel of the owner to recover freight, dismissed the same after applying so much of the money awarded for damage to the cotton as equaled the freight money. This, we think, was erroneous. The consignees had each filed his libel to recover this damage, and has succeeded. It is true each set up in his answer to the suit for freight, damage to the cotton by way of abatement of the sum claimed. But these

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parties could not split up the claim for damages by applying a portion in extinguishment of the freight money, and then ask for a decree for the excess over this sum. If they insist upon recovering damages on an independent suit they cannot apply any portion of them, by way of abatement, in the suit for the freight money. The damages are an entirety.

We must, therefore reverse the decree in the case of *Clifton* agt. a *Quantity of Cotton*, and direct a decree to be entered for the libelant for the full amount of the freight money and interest, with costs. And, as the full amount of freight at the rate of one and a quarter cents per pound will be recovered, the error will be corrected in the court below, reducing the freight of the portion of the cotton carried on deck to deck freight, and at the same time holding the brig responsible for the transportation of it under deck.

The decrees in the other two suits are affirmed, with costs.

SUPREME COURT.

**HENRY A. HARTT, THOMAS J. HALL and WILLIAM E. WHITING
agt. CHAS. R. HARVEY, CHAS. B. TOMPKINS and others.**

The *inspectors of election*, for an election of officers in a *religious incorporation*, are the judges of the *qualifications of the voters*, and they must *decide when the vote is offered*, and if in favor of receiving the vote, their decision is *final*. They have no power or authority after votes are deposited to enter into any examination of the qualifications of the voters, and count or reject votes on that ground, or to allow to either party the benefit of votes *offered* but not *received*. A *certificate* of an election given by the *inspectors*, under their *hands and seals*, that a person has been duly elected to an office, is *prima facie* evidence of his right. But where such certificate recites the facts upon which it was given, the right exists of going behind it to inquire into such facts and the validity of the election.

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A certificate is not essential to enable the party elected to take his office. If inspectors neglect or refuse to give a certificate, the party will be declared entitled to the office.

An injunction restraining defendants who have no right to an office, from assuming to act as such, cannot be granted in aid of the relief claimed by the plaintiffs which seeks compensation in damages by reason of the wrongful withholding of the certificate of election and keeping the plaintiffs out of office, the remedy is in a court of law.

Nor will an injunction be granted to determine the *right to an office*, unless the jurisdiction of the court attaches by reason of some considerations in the particular case, by reason of which a court of law cannot furnish adequate relief. The only way to get rid of officers illegally elected (unless there is jurisdiction in equity,) in religious corporations, is by *quo warranto*, and this remedy is entirely ample.

Nor will an injunction be granted on the ground of *fraud in the inspectors* of election in counting the votes and awarding the certificate of election to the defendants. Although fraud may be involved in the election, yet the right being a legal one, and a legal remedy furnished, adapted to the very case, there is no necessity to resort to a court of equity for relief.

New York Special Term, May, 1860.

MOTION by plaintiffs to continue a temporary injunction restraining the defendants, Harvey and Tompkins, from acting or assuming to act as trustees of the Society of the Church of the Puritans, in the city of New York. And also a like motion by the defendants, to restrain the plaintiffs from acting or assuming to act as trustees of said society, and for a modification of the plaintiffs' injunction. The facts will fully appear in the opinion of the court.

MULLIN, Justice. In order to decide the motions made in this cause, an investigation of the merits, to some extent is necessary, and the facts essential to an understanding of the case are briefly these: In March last, the annual meeting for the election of trustees was held by the religious society located in this city, duly incorporated and known as the Society of the Church of the Puritans. The defendants, White and Smith, were duly appointed inspectors of the election, pursuant to the provisions of the general law relating to the incorporation of religious societies. At the election, 64 votes were received by the inspectors for persons to fill the vacancies in the office of

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trustees of said society, which would occur in a few days subsequent to said election. There were nine trustees of the society—divided into three classes of three each, the term of office of one of such classes expiring each year. There were, therefore, three vacancies to be filled at said election. The plaintiffs were candidates to be voted for to fill said vacancies, and so were the defendants, Harvey and Tompkins, and one Bennett. The ballots of the persons voting were delivered to the inspectors; some of them offering to vote were challenged, on the ground that they were not legal voters at said election, and they were so declared by the said inspectors, and their votes rejected. After the votes were all received they were counted by the inspectors, and 64 votes were found in the box. The poll list kept by the clerk had but 51 names upon it. There is said to have been some confusion in the room, and the discrepancy between the poll list and count may be and probably is thus accounted for.

After the count, the inspectors declared the result of the election to be: That the plaintiffs had each 33 of the votes so as aforesaid received and counted, and the defendants Harvey and Tompkins, had each 31; and said Bennett had 27 votes and one Thomas Rondy, 3 votes.

Afterwards, and on the 23d of March, the said inspectors executed under their hands and seals a certificate, in which they certify and declare, that at said election 64 votes were cast for trustees, 33 of which appeared to be given for Hall, 33 for Whiting, and the same number for Hartt; 31 for Harvey, and the like number for Tompkins; 27 for Bennett and 3 for Rondy, and that they as inspectors declared the apparent result at the time; but very soon thereafter, and before they had prepared the certificate of election, evidence of a nature entirely conclusive and satisfactory was produced before them proving that at least six illegal votes were cast, and those six contained the names of the plaintiffs, and that these were counted as

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part of the 33 votes for them, as above stated. The certificate then proceeds as follows: "We therefore certify that Charles R. Harvey and Charles B. Tompkins have a plurality and a majority of the legal votes cast, and are duly elected trustees of the said society, to serve for three years from the 31st day of March, instant; that between the said Thomas J. Hall, William E. Whiting, Henry A. Hartt, and James D. Bennett, there was a tie vote, and neither of them is duly elected. All which is certified, &c." This certificate was delivered to the defendants, Harvey and Tompkins, who still hold it, and by virtue of it they claim to be duly elected trustees of said society for the term of three years.

Before the first meeting of the board of trustees was held, subsequent to such election, the plaintiffs, claiming to be duly elected trustees of said society, applied for and obtained a temporary injunction order restraining the defendants, Harvey and Tompkins, from acting or assuming to act as trustees of said society.

The defendants presented to Justice BONNEY a petition setting out the matter hereinbefore stated, charging upon the plaintiffs and others of the trustees misconduct at a meeting of the trustees held soon after said election, and that it was their intention to prevent the attendance of the quorum at the meetings of the trustees, and thus seriously impair the interests of the society, and praying that the plaintiffs be enjoined from acting or assuming to act as trustees. The injunction, as prayed for, was granted and served.

The applications now pending before me are to continue these injunctions, and by the defendants to modify plaintiffs' injunction, so as to allow one of the defendants to act as trustee in the event it shall be necessary to do so in order to form a quorum for the transaction of business.

Before proceeding to examine the question whether the court has the power to issue an injunction order in favor

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of either party in this court, it is proper to inquire which set of the claimants is duly elected trustees.

By section 3 of the general law relating to the incorporation of religious societies, it is provided that on the day of the first election of trustees of any such society, two elders or church wardens, or if there are no such persons, then two others, selected for the purpose, shall preside at such election, receive the votes of the electors, be the judges of the qualifications of electors, and officers to return the names of the persons who by plurality of votes shall be elected to serve as trustees, and the returning officers shall immediately thereafter certify, under their hands and seals, the names of the persons elected, &c.

By section 6, it is provided that all subsequent elections shall be held and conducted by the same persons and in the same manner above described, and the result thereof certified by them, and such certificate shall entitle the persons elected to act as trustees.

The 7th section of the same statute prescribes the qualifications of the voters, and requires the clerk to the trustees to keep a register of the names of such as shall desire to become stated hearers in said church; and shall therein note the time when such request was made, and the clerk shall attend all subsequent elections, in order to test the qualifications of such electors, in case the same shall be questioned.

There was no such list kept as is required by the 7th section, and hence the test of qualifications which such a document would furnish is wanting. But it is not claimed that such a list is necessary to the validity of the election, or that the qualifications of voters may not be ascertained by other means. (*The People agt. Peck*, 11 Wend., 604.)

The inspectors are declared to be judges of the qualifications of voters. Their action on that subject is judicial, and can only be reviewed in an action or proceedings instituted to review such determination.

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To constitute a person a voter he must have been a stated attendant on divine worship in the said church at least one year before such election, and shall have contributed to the support of said church, according to the customs and usages thereof. If a voter is challenged on the ground of the absence of some one or more of these qualifications, the inspectors must inquire, ascertain and determine, whether the voter possesses them.

The question arises for decision when the voter offers his vote, then the challenge is made, and the voter's right to vote must be determined before it can be received or rejected. If the vote is not challenged, there is no question for decision; the vote must be received. (*In the matter of the Chenango County Mutual Insurance Company*, 19 Wend., 635.) If he is challenged, the judge must in some mode ascertain and determine the question of qualification. For what purpose? In order that the person challenged may vote if qualified. When the vote is received the party has voted—his qualifications are ascertained and the judge has decided the question.

The voter has an interest in the determination; he has a right to be heard, and in many, if not most cases, he is the only person who can speak with certainty as to his qualifications. It cannot be possible that the legislature intended that three inspectors should receive votes without challenge or in defiance of a challenge, and after the election is ended enter into an examination of the qualifications of the voters, and count or reject votes as they shall then determine on the question of qualification. How are they in that stage of the business to ascertain which of the ballots to withdraw from the box and reject? Inspectors cannot be presumed to know the contents of the ballot. How then are they to separate the legal from the illegal—the votes of those qualified from the votes of those disqualified? The very statement of the proposition that such a power exists, excites surprise and alarm. It needs

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no argument to show how dangerous and how corrupt such a power in the hands of any class of men, however respectable, would become.

The innocent and legal voter, under such a system, is as likely to have his vote rejected as the illegal and fraudulent one. But it cannot be necessary to discuss the proposition. The inspectors, as judges of the qualifications of voters, must decide when the vote is offered, and the decision then made, if in favor of receiving the vote, is final. From the very necessity of the case a decision cannot be delayed until after the vote is deposited in the box.

The act of the inspectors in rejecting six of the plaintiffs' votes as illegal, after the same had been received and deposited in the box, was wholly unauthorized, and, so far as that question is involved in these motions, I must assume that the plaintiffs had 33 of the 64 votes cast, and, having a plurality, were therefore elected unless there is some other reason shown why they were not thus elected.

It is said that the certificate of the inspectors, given to the defendants, Harvey and Tompkins, is at least *prima facie* evidence of their right to the office and conclusive, except so far as the courts may, in an action on the motion of *quo warranto*, try and determine the right to the office without reference to the certificate.

I have no doubt that a certificate under the hands and seals of the inspectors, that a person has been duly elected a trustee, is *prima facie* evidence of his right; and had the certificate given to the defendants contained nothing but the declaration that defendants are elected, I should deem myself bound to so regard it. But it recites the facts upon which they rely as their justification and authority for declaring these parties elected; and these facts most clearly show that the defendants, Harvey and Tompkins, were not elected. When the inspectors admit that 64 votes only were received by them and placed in the box, and that of these the plaintiffs had each 33, it is shown to

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be legally impossible that the defendants, Harvey and Tompkins, could be legally elected. The certificate destroys itself. While it declares the right, it demonstrates that no such right existed. The statute only provides that the certificate shall entitle the party *elected* to the office. The election lies at the foundation of the right. When there is no election, there is no right, and the certificate cannot create it. Much stress was laid on the argument upon this certificate; but so long as it is *prima facie* evidence only of the right, and the right exists to go behind it and inquire into the fact of the election, its importance is not very great. A certificate is not essential to enable the party elected to take his office. If inspectors neglect or refuse to give a certificate, the party entitled will be declared entitled to the office. (*The People agt. Peck*, 11 Wend., 604.)

I must hold therefore, that upon the certificate in this case no right is shown in the defendants to the office, and of course, I cannot confer on them the right to a seat in the board of trustees, to which they have no color of right by election.

I have not gone into the question of the qualifications of voters in order to ascertain how the vote would stand, if the votes of legal voters, if any, which have been rejected, had been received, or, if illegal votes, if any received, had been rejected. I have treated the decision of the inspectors as to the qualification of voters as conclusive for the purpose of this investigation. It would be exceedingly hazardous to try such a question on affidavits, and it would be improper now to allow to either party the benefit of votes offered, but not received, merely because the person offering the vote proves that he intended to vote for plaintiffs or defendants. (*In matter of L. I. Railroad Company*, 19 Wend., 37.) The result of the election must be determined by the votes cast. If illegal votes can be ascertained, they may be rejected; but votes not

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received can never be made available in favor of either party.

If these views are correct, then I must consider the plaintiffs as the legally elected trustees of the church, and it only remains to inquire whether, if they are so, the court has power to restrain the defendants—who have no right to the office, from assuming to act as such—or whether upon any other ground the plaintiffs are entitled to an injunction against the defendants.

I have already stated the substance of the complaint. The only additional allegations which it seems to me important to refer to, are, that the inspectors and each of them are charged with having wrongfully and corruptly, designing and intending to evade the law, and also conspiring together to injure and annoy the plaintiffs, and defraud them of their rights and privileges as trustees duly elected by the said society, did illegally and fraudulently, and to the great trouble and damage of the plaintiffs, give and grant to defendants, Harvey and Tompkins, certificates of their election, whereby the said Harvey and Tompkins give out and threaten to act as trustees. The plaintiffs pray judgment that the certificates given to Harvey and Tompkins be adjudged null and void—that said defendants be ordered to grant regular certificates of election to the plaintiffs, and for a temporary injunction restraining the defendants, Harvey and Tompkins, from acting as trustees, and for \$5,000 damages sustained by the plaintiffs in the defendants' granting and receiving said certificate, and in their, the defendants, Harvey and Tompkins, acting or assuming to act as trustees.

Section 29 of the Code of Procedure prescribes the cases in which temporary injunctions may be issued, and they are:

1. When it appears by the complaint the plaintiff is entitled to the relief demanded, and such relief, or any part thereof, consists in restraining the commission, or con-

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tinuance of some act, the commission or continuance of which during the litigation, would produce injury to the plaintiff.

2. When pending the litigation, the defendant threatens, or is about to do, or is procuring or suffering to be done, some act in violation of the plaintiffs' rights respecting the subject of the action, and tending to render the judgment ineffectual.

3. When during the pendency of an action, defendant is about to dispose of his property with intent to defraud his creditors.

This case is most clearly not within the third branch of the foregoing section ; nor is it within the second branch. If the defendants, Harvey and Tompkins, should take possession of the office, the judgment in this case would not be rendered ineffectual. When the judgment shall declare that the plaintiffs are entitled to the office, the defendants then in office will be ousted and the plaintiffs put in. The possession of the office by the defendants in the intermediate time cannot in any manner affect the ultimate rights of the plaintiffs under the judgment if they shall obtain one. It is true, that in the mean time, while plaintiffs are kept out, the duties may be discharged by the defendants ; but if there was a quorum, without the plaintiffs and defendants, the same result must follow ; hence when the right of the plaintiffs is declared, it can have no retroactive effect upon the right or claim to the office.

The term of office is running, whether defendants are in or out of office, and the business of the corporation must, if possible, be carried on, although the right of a portion of the board be doubted or in dispute.

The right to the injunction then rests on the first branch of the section, and if not given by that, it is not within the power of the court to grant it.

Under the first clause, the test of the right to the injunction order is, does it appear by the complaint that the

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plaintiffs are entitled to the relief demanded? The question then is, are the plaintiffs entitled to all or any part of the relief prayed for in the complaint? It cannot be claimed that an injunction, permanent or temporary, is required in aid of that part of the relief which seeks compensation in damages by reason of the wrongful withholding of the certificate and keeping the plaintiffs out of office. It belongs to a court of law to grant that branch of the relief, and nothing is alleged in the complaint to show that an injunction is either necessary or proper in aid of the plaintiffs while prosecuting the suit to obtain that part of the relief demanded.

Another part of the relief sought is that the certificate of the defendants be declared null and void. This calls for an inquiry by the court into the right of the defendants to the office, and necessarily into the regularity of the election. This question ordinarily can only be tried in a proceeding in the nature of a *quo warranto*, which is expressly provided to try the right of a person to an office into which he may have unlawfully intruded. In that action the people may be the party, and the only party plaintiff. The claimant of the office, who seeks to be admitted, may be joined as relator, and the occupant of the office, the defendant, and in such action the right of both the relator and the defendant is determined. This is not an action in the nature of a *quo warranto*, and hence the jurisdiction of the court to grant the relief sought must be found, if at all, under some other head of jurisdiction, but is, as to the part of the relief prayed for now under consideration, a suit in equity to try and determine the right of the plaintiffs and defendants, to the office of trustee of this private corporation.

The chancellor held in *Meekly agt. Rochester City Bank*, (11 *Paige*, 118,) that a court of equity cannot interfere to restrain persons claiming to be the rightful trustees of a corporation from acting as such, on the ground that they

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have not been duly elected. Neither will a court of equity entertain a bill by shareholders in an incorporated joint stock company seeking merely to restrain the directors *de facto* from acting as such, on the sole ground of the alleged invalidity of their title to their office. Whether the parties claiming to be directors do or do not lawfully fill that character depends on a pure question of law—a preliminary question which must be decided before a court of equity can make any decree. (*Mozely* agt. *Alston*, 1 *Phillips*, Ch. R., 700; *Doremus* agt. *Dutch Church*, 2 *Green*, N. J., Ch. R., 332; *Angell and Ames on Corporations*; 9 *Barb. S. C. R.*, 66, 91, 93; *Affirmed* 1 *Kernan*, 243; 17 *Vesey*, 499; 13 *Vesey*, 509.)

It seems to me that upon these authorities it is impossible to hold that there is any jurisdiction in a court of equity to determine the right to an office, unless the jurisdiction attaches by reason of some considerations in the particular case by reason of which the court of law cannot furnish adequate relief.

The supreme court has the power by 2d R. S., (5th ed., 600, § 5,) to inquire into the regularity of corporate elections, and to vacate them and direct new elections to be held. But religious corporations are expressly excepted from the operation of this statute, and hence as to the disputed right to an office must be settled in some other manner.

The only way, therefore, to get rid of officers illegally elected, (unless there is jurisdiction in equity,) in religious corporations, is by *quo warranto*. But to entitle the people to bring such an action, a mere claim to be an officer is not enough—the defendant must be in possession of the office. (*Angell and Ames on Corporations*, § 714.) The defendants, it appears, are not in possession of the office, having been prevented by injunction from taking possession before there was an opportunity for the performance of an official act. Under these circumstances, it seems to

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me the plaintiffs cannot ask relief on the ground that the defendants are not in office when their own act has prevented defendants from taking it.

The remedy by suit, in the nature of *quo warranto*, is the plain and obvious remedy for the plaintiffs. That action is adapted to the case. If required it may be tried by a jury in a court of law, where legal questions are properly cognizable. The reasons given by the courts of equity for not taking jurisdiction of questions of corporate elections, is that the right to the office involves a legal question, and that should be tried and determined at law before resort is had to equity.

Although the distinction between actions at law and in equity is abolished, yet the inherent distinction between legal and equitable jurisdiction and relief exists, and it is not in the power of constitutions or legal enactments to abolish it. This natural and necessary distinction is recognized by the constitution, and is provided for by the Code, in prescribing different modes of trial for the two classes of actions.

There is but one other ground on which relief in equity in this case can be claimed, and that is the fraud charged on the inspectors in counting the votes and awarding the certificate. Fraud is one of the most extensive branches of equitable jurisdiction, and indeed it may be said that it is the prominent and peculiar head of jurisdiction in courts of equity. But courts of law have had concurrent jurisdiction with those courts in matters of fraud; but owing to the power of courts of equity to shape the relief granted to the necessity of the case in hand, these courts always have and always will be the appropriate tribunals for the trial of those questions.

But, as I have already remarked, a court of equity refuses to entertain jurisdiction over corporate elections, because the questions involved are legal ones, and were properly triable in a court of law. It would seem to fol-

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low that, although fraud may be involved in the election, yet that the right being a legal one, and a legal remedy furnished adapted to the very case, there is no necessity of a resort to courts of equity for relief. Again, if fraud in the inspectors of election will give jurisdiction to the equity court, fraud in the voter should have the same result, and thus, almost every contested election would be drawn away from the usual and proper modes of trial for legal actions, and transferred to the courts of equity, no more capable of affording relief than the courts of law.

There is still another reason why neither courts of law nor equity should try the right to an office in an action between individuals. Such a trial does not determine the right, it does not end the litigation. In an action in the nature of *quo warranto* the people are the parties plaintiff, or with the person claiming the office as relator, against the defendant, the person in office. In such an action, not only is the right of the defendant determined, but that of the relator also ; hence, if the defendant is found not entitled, but the relator is, the former is put out and the latter put in ; but if neither is entitled, both are ousted and the office declared vacant. Every claimant is bound, his rights determined and a final end put to the litigation. In an action between the claimants for the office when the people are not a party, the rights of the latter are not affected, the judgment does not bind them, and they are therefore at liberty to litigate the whole question again, to the great annoyance and expense of parties, and making unnecessary labor for the court.

I will not say that in no case may a court of equity entertain jurisdiction between individuals, to try the right to an office. Circumstances may be supposed when by the act of the claimants of the office holding the evidence of right to it, but not in fact entitled, the proceeding by *quo warranto* or *mandamus* could not be instituted, and yet the other party claiming title to the office cannot get into

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possession. In such case, to prevent a failure of justice, a court of equity would assume jurisdiction and determine the right.

No such necessity is shown or alleged in this case, and hence I must hold that this court, as a court of equity, has not power to grant the plaintiffs the relief demanded, and therefore I cannot continue the injunction. I have already said, that if the plaintiffs are entitled to damages, the continuance of the injunction is not essential to the protection of their right in reference to that relief.

I am aware it is not usual, nor ordinarily is it proper, to inquire into the right of the court to grant relief upon an application for an injunction; still less to refuse an injunction when the question of jurisdiction is doubtful, and when refusing, it may produce injury to the party applying. But the Code requires as prerequisite to the injunction, that it appear by the complaint that the party is entitled to the relief demanded. This involves the question of the power of the court to grant relief in the case, and as I have no doubt but that the court, as a court of equity, has no power to grant the relief demanded in this case, I must deny the plaintiffs' motion for a continuance of the injunction.

The motion of the defendants is also denied, without costs to either party.

COURT OF APPEALS.

BOARD OF COMMISSIONERS OF EXCISE OF TOMPKINS COUNTY, respondents agt. JAMES B. TAYLOR and JOHN C. McWHORTER, appellants.

"Whoever shall sell any *strong or spirituous liquors* or *wines* in quantities less than five gallons at a time, without having a license therefor, granted as herein provided, shall forfeit fifty dollars for each offence." (Law 1857, ch. 628, § 18.)

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Held, that ale or strong beer are included in this section, as embraced in the terms "strong or spirituous liquors" expressed therein.

It seems that the line of distinction to be drawn between the different kinds of liquor containing alcohol, in order to determine upon which of them the statute was intended to operate, is, between those which are capable of causing intoxication, and those containing so small a per centage of alcohol that the human stomach cannot contain sufficient of the liquid to produce that effect.

June Term, 1860.

APPEAL from the supreme court and submission without action, under section 372 of the Code of Procedure. The stipulation containing the facts agreed upon, states that "the defendants, on the 3d day of October, 1859, at their store in Ithaca, without having a license to sell any strong or spirituous liquors or wines, sold strong beer in a quantity less than five gallons, to wit: a glass of strong beer to Mr. J. R. Smith, to be drunk in their store or shop, and which was drunk in their said store."

The defendants claimed that they had a right to sell such glass of strong beer without a license. The plaintiffs claimed that the defendants had no such right, and that by such sale they had forfeited the sum of \$50, and were liable for such sum to the plaintiffs.

The supreme court at general term in the sixth district rendered judgment on the submission in favor of the plaintiffs for \$50, with costs. The defendants appealed to this court.

The case was submitted on printed arguments.

FERRIS & DOWE, for appellants.

DANA, BEERS & HOWARD, for respondents.

WELLES, J. The law upon which the judgment in the court below was founded is the 13th section of the act, entitled "An act," &c.

That section is in the following words: "Whoever shall sell any strong or spirituous liquors or wines, in quantities

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less than five gallons at a time, without having a license therefor granted as herein provided, shall forfeit fifty dollars for each offence."

The only question to be decided is, whether strong beer is embraced in the terms strong or spirituous liquors, as expressed in the section referred to.

In the case of *Nevin agt. Ladue*, (3 *Denio R.*, 43,) it was held that ale and strong beer were included in the terms "strong or spirituous liquors," as used in the excise law of the Revised Statutes (1 *R. S.*, 680, § 15,) making it penal to sell such liquors in quantities less than five gallons without a license. The section of the Revised Statutes referred to is identical with section 13 of the act of 1857, above recited, excepting that in the former the penalty for such sale was \$25, and in the latter it is \$50.

The case of *Nevin agt. Ladue* was afterwards taken to the court of errors (3 *Denio*, 437,) where the judgment of the supreme court was reversed, on the ground that upon the trial before the justice where the action was originally commenced, the judgment was rendered against Nevin on his confession that he had sold ale or strong beer or fermented beer without a license. He was charged before the justice with having sold ale, strong beer, or fermented beer, and he confessed the charge. The court of errors held that the term fermented beer might have well been understood by Nevin to mean some one of the various kinds of beer which had long been in use in this country, under the different names of spruce beer, ginger beer, molasses beer, &c., none of which could properly be termed strong beer or included in the words of the statute, "strong or spirituous liquors," and all of which had undergone, to some extent, the process of fermentation; and, therefore, as the charge confessed was of selling only one of three kinds of liquor, to wit: ale or strong beer, or fermented beer, the charge and confession might as well have relation to the latter as to either of the others, and being

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thus in the alternative, did not prove the sale of either one in particular.

The only opinion reported in the court of errors was by Chancellor WALWORTH, who after an elaborate examination of the question, holds decidedly, that ale and strong beer were both included in the words strong liquors, and that both were within the prohibition of the statute. But for the reasons stated before, he was in favor of reversing the judgment.

The report of the case states that Senators BURTON, SPENCER, and WRIGHT delivered written opinions for reversals on the ground that the question whether the sale of ale or strong beer was prohibited by the statute did not arise; it not being shown, as they construed the return of the justice, that the defendant had sold such liquors. But their opinions are not reported. It does not appear that any member of the court expressed any dissent from the views of the chancellor. The case, especially as decided by the supreme court, is an authority directly in point in support of the judgment below in the case under consideration.

In the case of the *People agt. Wheelock*, (3 Parker Cr. R., 9,) it is even held that the word "beer," in its ordinary sense, denoted a beverage which is intoxicating, and was within the meaning of the words "strong and spirituous liquors," as used in the Revised Statutes. That case was decided at a general term of the supreme court, in the 7th district, in March, 1855. There may seem to be, at first view, a discrepancy between the case last referred to and that of *Nevin agt. Ladue*, inasmuch as the latter holds that the sale of "fermented beer" is not prohibited, and in the former "beer" is held to be within the prohibition of the statute. But this apparent discrepancy disappears when it is borne in mind that in *Nevin agt. Ladue* the expression "fermented beer" is used in addition as in contradistinction to "strong beer," showing clearly that fermented beer is there intended as something different from

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strong beer, or a beer which is not strong. In the *Board of Commissioners, &c., of Cayuga Co.* agt. *Freoff*, (17 *How. P. R.*, 442,) it was held at special term that "ale and strong beer" were included in the prohibition of the 13th section of the excise law of 1857. That case was decided in January, 1858. In the case of the *People* agt. *Crilley*, decided at the general term of the supreme court, in the 2nd district, in July, 1855, (20 *Barb. S. C. R.*, 246,) it was held that the sale of ale in quantities less than five gallons without a license was not prohibited by the excise law of the Revised Statutes.

The foregoing are all the reported cases decided in this State that I have met with, bearing upon the question under consideration. But I understand that in several of the districts, and particularly in the 6th, the supreme court have uniformly held, both at general and special terms, that the sale of ale and strong beer are within the excise law of the Revised Statutes, and that of 1857; and I am not aware that the case of the *People* agt. *Crilley, supra*, has ever been followed out of the 2d district.

But independent of any adjudications of the question, it seems to me entirely apparent that the legislature had in view, both in the excise law of the Revised Statutes, and in the statute of 1857, referred to, and particularly in the latter, the regulation of the sale of all and every kind of intoxicating liquors, and intended to prohibit their sale in quantities less than five gallons without the license provided for.

Among the various descriptions of liquors mentioned in the statute of 1857, the sale of which it undertakes to regulate, none are specified by name excepting wine, and that only by the general term, wine or wines, without describing in any way the kind of wine. In other respects descriptive words are employed to show the kind or character of liquors the sale of which, without license, is denounced. First, in the title of the act, it is to suppress

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intemperance, and to regulate the sale of intoxicating liquors. Sections 2 and 6 use the expression, "strong and spirituous liquors and wines." Section 5 uses the words, "strong or spirituous liquors." Section 10, "any sort of strong or spirituous liquors or wines." Sections 11, 20, 25 and 27, "strong or spirituous liquors or wines." Sections 12, 13, 14, 15, 18 and 28, "any strong or spirituous liquors or wines." Section 12, "any strong liquors or wines." Section 15, "any strong or spirituous liquors." Section 19, "intoxicating liquors." Section 29, "imported or other intoxicating liquors;" also, "intoxicating liquors or wines." Section 31, "intoxicating drinks."

The ravages upon the physical, intellectual, and spiritual condition of our race by the habitual use of intoxicating beverages, together with the labors for the last forty years of benevolent and philanthropic individuals to arrest the scourge by efforts to produce a revolution in the sentiments, practices, and habits of the community in respect thereto, and the several legislative enactments with the same end in view, which have been the results of those labors and efforts, are all, as I think, matters of judicial cognizance, and are proper to be borne in mind and referred to in our examination to ascertain the meaning and true interpretation of the statute now in force on this subject.

In view of these considerations, it is quite apparent that the great and paramount object and design of the legislature, in the present statute, was to restrain, not by absolute and indiscriminate prohibition, but by a process of regulation, the habitual and intemperate use of any intoxicating beverage. In the language of the title of the act, it was to prevent intemperance. In looking through the act, we see that this was to be accomplished principally by regulating the sale of certain liquors in small quantities, and by particular and limited prohibitions of such sales. The liquors, the traffic in which was to be thus

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regulated, were such as were known to be capable, when drank, of producing, and which generally resulted in partial or total intoxication.

Speculations have from time to time been indulged in, founded upon the percentage of alcohol which different kinds of beverages contain, as ascertained by chemical analyses; and attempts have been made to show that the character or strength of the liquor, the sale and use of which the statute was intended to regulate and repress, is to be governed by such percentage. But it seems to me but one safe and sensible line of distinction can be drawn between the different kinds of liquor containing alcohol, in order to determine upon which of them the statute was intended to operate, and that is, between those which are capable of causing intoxication and those containing so small a per centage of alcohol that the human stomach cannot contain sufficient of the liquid to produce that effect, as is said to be the case with spruce beer, ginger beer, lager beer, and some others. It must be strong liquor; that is, strong enough with the intoxicating principle or element, whether obtained by distillation or fermentation, to produce intoxication. If that be its character, the unlicensed vender, at retail or in quantities mentioned in the 13th section, incurs the penalty of the statute.

Now that ale, strong beer, porter, and most of the fermented drinks known in this country, and which are sold at public houses and groceries by the drink, can and do produce intoxication to a greater or less extent, and that such is the ordinary effect of their use as a beverage, no man of mature years, who is not strangely oblivious to surrounding and passing events, can have failed to observe. The fact is so patent that it is impossible to close our eyes against it. There is, in my opinion, one aspect in which the unrestrained sale of such liquors by the drink is far more injurious than that of distilled liquors. I allude to

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the temptation it presents to the reformed or reforming inebriate, who will much more readily yield to a draught of the former than of the latter, and thus fall a hopeless victim to the appetite which he had well nigh conquered.

Upon the whole, it seems to me but little short of absurd to contend that the excise law now in force should receive the construction contended for by the appellant, which would leave at least one-half of the evil intended to be remedied entirely untouched and unprovided against.

For the foregoing reasons I am in favor of affirming the judgment of the supreme court.

Judgment affirmed.

COMSTOCK, J., and DENIO, J., dissented.

NOTE.—What disposition is to be made of cider? If a person should call at a bar for a glass of "strong or spirituous liquors," the bar-keeper would not probably think to set him on a glass of cider, if he did even a glass of ale; and cider is well known to be intoxicating; to a certain extent at least. We knew, in boyhood, a man so addicted to intoxication on cider, that the neighbors used to say he would get drunk lying under a sour apple tree. Such a man would not need a sealer of weights and measures to gange his stomach to determine and settle its legal capacity for holding alcohol. But seriously, we think the day of penal laws and statutes in reference to the sale or use of alcoholic liquors of any and all descriptions, is about gone by. So long, however, as these statutes are in force the courts will do the best they can in construing them. After all the severe battles over old alcohol for the last thirty or forty years, in which numerous victories have been won and lost, it still remains a matter of traffic and use, and perhaps to a greater extent than ever. Such a fact alone, indicates very clearly that a free, enlightened and intelligent people will no more be controlled by statute laws on the subject of their eating and drinking, than on the subject of their religious faith and practice.—R.S.P.

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SUPREME COURT.

THE UNION BANK agt. JACOB H. MOTT and GARRETT S. MOTT.

Where pending the trial of an action the court allows the plaintiff to amend his complaint by inserting a new count for a second and separate cause of action, the defendant has a right to have such amended complaint served upon him in the usual manner, and the legal right to answer or demur to the same as in other cases. And such an order affects a substantial right which may be reviewed on appeal, and will be reversed where the defendant has been deprived of such right.

And where such order, without the consent of the defendant, provides that the testimony already taken on the first hearing be adopted on the further hearing under the amended complaint as testimony in the case, under the pleadings as amended, it is sufficient cause for reversal of that part of the order. Such an order also invades a substantial right of the defendant and is appealable. (This decision reverses in part that made at special term in this case, ante page 114.)

Where such an amendment of the complaint is made, the defendant should be allowed at least a trial fee and his disbursements.

New York General Term, June, 1860.

INGRAHAM, MULLIN and E. DARWIN SMITH, *Justices.*

THIS action was commenced in March, 1859. The complaint charged the defendants with an indebtedness of \$141,586, for moneys fraudulently obtained from plaintiff between the first day of January, 1849, and the 16th day of March, 1858, by means of overdrafts and false entries in the books of account of the plaintiff, in collusion and with the aid of a book keeper in the employ of the plaintiff during that time.

A judgment was obtained by default against Garrett S. The default was afterwards opened on terms, but the judgment ordered to stand as security. Both defendants, by separate answers, denied the complaint and set up the statute of limitations. After answer, the defendants were arrested and held to bail in the sum of \$142,000.

The cause was by consent referred, and on the hearing before the referee the evidence given covered the whole

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period stated in the complaint, from which it appeared that the plaintiff was an institution organized under the general banking law, in December, 1852, and commenced business January 1st, 1853; that the institution known as the Union Bank, existing before the last date, was chartered in 1811, by the name of The President, Directors and Company of the Union Bank of the city of New York, and that said charter expired, and said bank ceased to exist, on the last day of December, 1852, that all the claims against the defendants but \$1000 occurred previous to 1853, and were held by the plaintiff as assignee.

Upon the close of the proof, it was insisted that under the complaint the plaintiff was not entitled to recover for any claim accruing prior to 1853. The plaintiff claimed that the referee should conform the pleadings to the facts proved, but he declined.

The plaintiff then moved before the referee for leave to amend the complaint, by inserting another count for the claim accruing prior to 1853 as assignee. This motion the referee granted. The defendants obtained an order for the plaintiff to show cause why the said order of said referee should not be vacated; and after hearing, said order was set aside, with liberty to plaintiff to apply to the court by motion for leave to amend. (*See 18 How. Pr. R.*) The motion to the court to amend was made and decided at special term in May, 1860. (*See ante page 114.*) From this decision an appeal was taken by the defendant, Garrett S. Mott, to the general term.

DUDLEY FIELD, *for appellant.*

1. The court has not the power to grant this amendment. A judgment has been recovered, and the trial now pending is for the sole purpose of determining whether that judgment shall be enforced, and if so, to what extent.

The court could not insert a new cause of action into

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the judgment roll now on the records of the court, and if it could not do that it cannot make this amendment, because it cannot do indirectly what it cannot do directly. A new cause of action now interposed may give the plaintiff a lien under that judgment for a cause of action not contained in its record; and for which, forsooth the record would show, a new action might be instituted. (*Miller* agt. *Eagle Life Ins. Co.*, 3 *E. D. Smith*, 184; *Pierce* agt. *Thomas*, 4 *E. D. Smith*, 356; *Swartwout* agt. *Curtis*, 4 *Comst.*, 415; *Hanemair* agt. *Waterbury, MSS. Sup. Ct.*)

2. If the court had the power to amend the complaint in these circumstances, the amendment must distinguish between the different causes of action. Two counts for the same cause are not allowable under the Code. If a second cause of action be inserted for \$140,000, the first must be reduced to \$1,000. (*Whittier* agt. *Bates*, 2 *Abb.*, 477; *Stockbridge Iron Co.* agt. *Mellor*, 5 *How.*, 439; *Churchill* agt. *Churchill*, 9 *How.*, 552; *Lucky* agt. *Underhill*, 10 *How.*, 155; *Dickens* agt. *N. Y. Cent. R. R.*, 13 *How.*, 228; *Ford* agt. *Mattice*, 14 *How.*, 91.)

3. The amended complaint must be verified. The court has not the power to dispense with the verification—a pleading cannot be sworn to in parts; either the whole is sworn to, or none of it is sworn to. (Code, § 156-157.)

4. If the amendment be made, the defendant has the right to answer the amendment. A new cause of action being inserted, he cannot be deprived of the right of pleading to it in his own way.

5. If the court would impose an answer on a defendant, it would not deprive him of an answer altogether. In the present case, the allegation of an assignment from one bank to the other is not denied, and would stand admitted.

The plaintiff's counsel appears to suppose that the second and third articles of Garrett G. Mott's answer would put all the allegations of the new cause of action in issue. This is a mistake. A denial of indebtedness, stand-

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ing alone, does not tender an issue upon a material fact. It is only good when taken in connection with the denials of the facts out of which the indebtedness would arise. It would be necessary, in answer to the new cause of action, to follow up the denial of indebtedness by denials of the facts; namely, in the obtaining of money from the old bank by over-drafts upon that bank, and the assignment to the plaintiff before the commencement of this action.

The limitation set up in the eighth article of the answer is also inapplicable to the original demand.

An answer which denies that the plaintiff is entitled to the money demanded will be struck out on motion. It contains nothing which can be called the statement of a fact. The court of appeals, in *Allen* agt. *Patterson*, (3 *Selden*, 476,) distinctly recognized the duty of a pleader distinctly to aver or state every fact on which he relies to support the legal proposition upon which his right to maintain or defend the suit is dependent. (*Drake* agt. *Cockcroft*, 10 *How.*, 377.)

A denial which only controverts a conclusion of law, is bad. (*Seely* agt. *Engell*, 17 *Burb.*, 530; *Russell* agt. *Clapp*, 4 *How.*, 347; *Gleny* agt. *Hitchins*, 4 *How.*, 98; *McMurray* agt. *Gifford*, 5 *How.*, 14.)

6. The order of reference was by consent, and referred to the issues then existing; the court can only extend the defendant's consent to a reference of other issues, not anticipated by him when his consent was given.

JOHN Foot, *for respondent.*

1. This court had full power to make the amendment. (§ 169, 171 and 173 of *Code*; *Hagins* agt. *De Hart*, 12 *How. Pr. R.*, 322; *Hall* agt. *Gould*, 3 *Kernan*, 134; *Prindle* agt. *Aldrich*, 13 *How. Pr. R.*, 466.)

The claim is not changed by the amendment asked and allowed. The claim is the relief sought. The cause of action is the statement of facts.

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An amendment of a complaint, though it change the cause of action, will be allowed if the claim remain the same. (*Chapman agt. Webb*, 6 *How. Pr. R.*, 390; *Prindle agt. Aldrich*, 13 *How. Pr. R.*, 466.)

A variance between pleadings and proof, sufficient to defeat the action or destroy the defence, must leave the case unproved in its entire scope and meaning. If left unproved in some particulars, it is a subject of amendment. (*Fay agt. Grimstead*, 10 *Barb.*, 330.)

In this case the referee decided the proof complete with respect to \$1,000 of the claim. The balance if left unproved is, therefore, the subject of amendment. Further, full proof has been given in respect to the balance of the claim, and the assignment of the claim was proved before the referee. All that is asked, is an allegation setting it forth in the complaint to conform the pleadings to the facts proved.

The issue is not changed. The old complaint covers the money claimed and mentioned in the amendment. The defendants' answers fully meet the amendment allowed. The defendants, to show that they were not indebted, proved the existence of the old bank. The plaintiff, to meet and rebut that fact, showed the assignment to the plaintiff. The defendants attacked its legality. Full proof has been given respecting it. All that was asked, was to conform the pleadings to the facts proved before the referee.

2. The amendment allowed at special term was so allowed after full argument and proof of its necessity to the plaintiff's case, and it should not be altered in its terms by this court.

By the court—E. DARWIN SMITH, Justice. The first question presented upon this appeal is whether or not the order of the special term is reviewable. The power of this court to amend a complaint in any stage of the action by allowing the plaintiff to insert a new count therein can-

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not be doubted. An application for leave to make such amendment is addressed to the sound judicial discretion of the court. The exercise of this discretion is among the most embarrassing duties cast upon the courts, and yet its existence and exercise is indispensable to the proper administration of public justice.

It is well settled law that orders resting in discretion cannot be reviewed upon appeal. But this doctrine is obviously subject to some limitation. The discretion which is confided to the courts is not an arbitrary and capricious discretion. It is a power regulated by legal principles, and which cannot be used for the purpose of injustice or oppression. An order in an action which the court may in its discretion grant or deny, clearly cannot be reviewed upon appeal unless in the *terms* which it imposes, or upon which it is granted, it invades "*some substantial right*," or transcends the limits of legal discretion.

Courts constantly exercise the power when a party has made a slip in his proceedings, or is in default, and asks a favor to grant such favor upon conditions that the party asking it waive some strict legal right,—such as that he consent that a judgment be entered to stand as security,—that he consent to refer a cause not referable; that he take short notice of trial; that he indemnify the opposite party by the payment of costs, and other like equitable terms.

In such cases the order is not appealable. But this rule only applies as against the party asking for a favor. A party asking no favor of the court, and standing upon his strict legal rights, and who has been guilty of no default, cannot be required to waive any of those rights, and they cannot be taken away from him by the court without his consent. It is because I think the order granted at special term violates this principle that I think it may so far be reviewed upon appeal.

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When the trial was arrested before the referee and the amendment granted by him was allowed, the defendants had really succeeded in successfully defending the suit to the extent of the whole claim of the plaintiffs except the sum of \$1,000. The plaintiffs then asked to insert a new count in their complaint to cover a claim for the sum of \$141,586, which they had acquired by purchase and assignment. We agree with Judge ALLEN, that the referee had no power to allow such an amendment, and that it was not a case of variance, and was not such an amendment as should be allowed on the trial of a cause; but the *court* could undoubtedly allow such amendment upon proper terms. But when the plaintiffs asked and were allowed to insert such new count for a second and separate cause of action, we think the defendants had the right to have such amended complaint served upon them in the usual manner, and had the legal right to answer or demur to the same as in other cases. Of this right they were deprived by the order made at special term, extending the answer to such amended complaint.

I cannot conceive upon what ground the defendants could be lawfully deprived of this right. It seems to me it was just as absolute as though a new suit had been commenced for this \$141,585. The right to answer or demur to a complaint, or to an amended complaint inserting an entire new cause of action, is a strict legal right, and the court cannot take it away from any person, not in default, who is prosecuted in a suit at law.

The defendants did not, in this case, ask any favor. They were not before the court, therefore, in any position to be required to waive any legal rights, or to submit to any equitable terms. It may be that the right to answer over would be of no practical use to them; but that is a question the court cannot decide for them. They are entitled to decide it for themselves upon the advice of their counsel.

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The order deprives them of this right, and so far, I think, it *affects a substantial right*, and within the spirit and intent of subdivision number 3 of section 349 of the Code, is reviewable upon appeal.

The provision in the order also, that the testimony already taken on the first hearing be adopted on the further hearing under the amended complaint, as testimony in the case under the pleadings as amended, also, I think, invades a substantial right of the defendants.

If such evidence was pertinent to the new issue to be formed, and the defendants were satisfied to have it received upon the trial of such issue; and if they had fully cross-examined the witnesses of the plaintiff—they probably would do so—it might have been with their consent, and doubtless would, in fact, with such consent, have been so used and applied. But I cannot see what power the court has, arbitrarily and without such consent, in opposition to the wishes of the defendants, to order that it shall be so received and used.

As we think the order as it stands cannot be sustained, the question is presented whether we shall reverse or modify it. Ordinarily the court of review should in such cases make such order as the court below, in its opinion, should have made. The order, so far as it grants leave to amend, is right and should be affirmed; but as the question of *terms*, except as hereinbefore considered, has not been particularly discussed here, I should have preferred simply to reverse the order and leave the court at special term, upon a hearing of the parties, to make such new terms as may be proper in view of our decisions. But the press upon the courts in this city, in respect to this particular class of business, is so great that it is quite undesirable and inexpedient to send cases back to special term unless it is indispensably necessary so to do.

The rule in all cases of the amendment of pleadings is, that the amendment shall not be made at the expense of

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the opposite party, and that he be indemnified for all additional expense involved in such amendment.

The amendment in this case upon strict right, and unless the defendant consents to use the testimony before taken by the referee upon the new issues to be found, involves virtually a new trial of the cause.

We think, therefore, the amendment should not have been allowed without payment at least of a trial fee, and the disbursements incurred by the defendants. The order above should therefore, so far as it extends the answer to the amended complaint, and adopts or applies the testimony taken before the referee to the issues to be made by the amended pleadings, be reversed with \$10 costs, and that the residue of said order be affirmed upon the payment of a trial fee and the disbursements incurred by the defendants for witness fees, printing expenses, and other disbursements on such trial and since. The plaintiffs to serve their amended complaint in the usual manner, making such amendments as they may be advised, and the defendants to have the usual time to answer or demur to such amended complaint; and it is so ordered.

MULLIN, J., concurred.

SUPREME COURT.

BENJAMIN H. MORSE agt. NICHOLAS SWITS and GEORGE G. MAXON.

Every person who makes a public representation which he knows to be false, and upon faith in which any one has been led into a business transaction, and acted upon such false representation to his loss, the party making it shall answer to him for the damages. He shall not be at liberty to sow falsehood broadcast, without being responsible for the loss it causes.

Therefore, where it was alleged that the defendants, the president and cashier of a bank, in making and publishing the quarterly report of the resources and liabilities of the bank, required by statute, made a statement of the condition of

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the bank, on a given day, which statement (under oath) was to their knowledge *grossly false*—giving the particular items which were untrue; and the plaintiff upon the faith and relying upon the truth of such statement and report, purchased thirty-six shares of the capital stock of said bank at the par value thereof, when in truth and in fact the capital of said bank was impaired, and on the day mentioned in said report its stock was worth only about thirty cents on the dollar,

Held, on demurrer, that the defendants were liable. It could not affect the defendants' liability, that under the statute the defendants made the report to the bank, and the bank to the *superintendent* of the bank department, and the latter published it.

The averment in the complaint that the defendants made and published the statement "with intent to deceive and defraud those who might become purchasers and owners of the stock," was not so general, as that the intent was to deceive and defraud the public merely, but sufficient to authorize a recovery by the plaintiff.

Albany General Term, December, 1859.

Hon. Wm. B. Wright, George Gould, and Henry Hoëboom, Justices.

THIS action is brought against the defendants, who are president and cashier of the Mohawk Bank of Schenectady, to recover damages, which plaintiff alleges he has sustained by the false and fraudulent statement and report made and published by them of the condition and resources of the Mohawk Bank of Schenectady, as they existed on the 19th day of June, 1858, the plaintiff having, subsequent thereto, became the owner and purchaser of thirty-six shares of the stock of said bank, at its par value of fifty dollars, which he purchased upon the faith and relying upon the truth of said statement and quarterly report.

The complaint is as follows:

"Benjamin H. Morse, the plaintiff in the above action, by Edward Rosa, his attorney, complains of Nicholas Swits and George G. Maxon, the defendants herein, and thereupon shows to this court, that heretofore, and at the time of the purchase of the stock hereinafter mentioned, this plaintiff was ignorant of the true and actual value of the capital stock of the Mohawk Bank of Schenectady, of the resources and assets of said bank, and of the actual condition thereof; that prior to said purchase said defend-

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anta, as president and cashier of said bank, had, in pursuance of the requirements of section 125, title 2, chapter 18, part 1, of the Revised Statutes, of the state of New York, and on or about the 14th day of July, 1858, made and published under their respective oaths, a statement and quarterly report of said bank, as it existed on the morning of June 19th, 1858, which statement and report is hereunto annexed, marked schedule A, and forming a part hereof; that among the items contributing and making up the alleged resources and assets of said bank, in said report and statement contained, is the following:

"Due from banks, \$129,389⁴⁶." And this plaintiff further alleges, that after said publication of said report and statement by said defendants, and in the month of September, 1858, this plaintiff believing said report and statement to be true, and confiding in the same, and believing therefrom that among the resources of said bank was an actual bona fide indebtedness, from banks to said Mohawk Bank of Schenectady, of \$129,389⁴⁶, and being deceived thereby, did purchase thirty-six shares of the capital stock of said Mohawk Bank of Schenectady, at and after the rate of the par value thereof, namely at the sum of fifty dollars for each and every share of said stock, the same being according to said statement and report, the actual value thereof at said time. This plaintiff alleges that, at said time he was ignorant of the falseness of said statement in regard to said indebtedness from other banks to said Mohawk Bank of Schenectady, and of the depreciation of the value of said stock arising from said falseness.

And this plaintiff alleges that there was not due to said Mohawk Bank of Schenectady, on said 19th day of June, 1858, nor at the time that said defendants made oath to said statement and report, nor at the time of the publication of said report and statement, nor at the time of the purchase of said shares of stock by this plaintiff, from

Memorandum.

other banks the sum of \$129,389¹⁰⁰; nor was there in fact due from other banks to said Mohawk Bank of Schenectady, at said time, and times to exceed \$5,000. And this plaintiff alleges that said defendants falsely and fraudulently included in the sum alleged in said report and statement to be due from other banks the sum of about \$125,000 from the Mohawk Bank; whereas in truth and in fact there did not exist at either of said times any such bank, nor any indebtedness therefrom—of all which said defendants well knew. That said defendants, by said statement and report, falsely and fraudulently induced this plaintiff to believe, and from such statement and report this plaintiff was induced to believe, and did believe, that the capital of said bank was unimpaired, and its stock worth the par value thereof. Whereas, in truth and in fact, the capital of said bank was impaired at and on said 19th day of June, and on July 14th, 1858, and its stock only worth about thirty cents on the dollar of the par value thereof; and said bank had suffered a depreciation and loss of over \$100,000 of its capital stock, all of which said defendants well knew when they made the false and fraudulent report and statement aforesaid, and published the same as aforesaid.

And this plaintiff alleges that said quarterly report and statement so made by said defendants, as president and cashier of said Mohawk Bank of Schenectady, was false in stating that there was due from banks to said Mohawk Bank of Schenectady, on said June 19, 1858, said sum of \$129,389¹⁰⁰, and said defendants, as such president and cashier, well knew the same to be false. And this plaintiff alleges that said defendants, as such president and cashier, fraudulently concealed the fact of the loss of the capital of said bank of over \$100,000. That said defendants did also in and by such report, falsely and fraudulently state that on said June 19, 1858, said Mohawk Bank of Schenectady was in a sound and healthy condition, and its capital stock unimpaired.

Memorandum.

And this plaintiff further alleges and charges that the said quarterly report and statement of the condition and resources of the said Mohawk Bank of Schenectady, was made with intent to deceive and defraud the holders and owners of the stock of said bank, and those who might become purchasers and owners thereof. And the said plaintiff further alleges and charges that he became the purchaser and owner of the said thirty-six shares of the capital stock of the said Mohawk Bank of Schenectady, and paid therefor the par value of said stock, being fifty dollars for each and every share thereof, upon the faith and relying upon the truth of the said quarterly statement and report, as made by the said defendants, of the condition and resources of the said bank; and without any knowledge, or the means of knowing at the time of said purchase that the statement in said report "that there was due from banks" to the said Mohawk Bank of Schenectady, the said sum of \$129,399¹⁸, was wholly false and fraudulent.

And the said plaintiff alleges and states that on the said 19th day of June, 1858, or on the day the said plaintiff became the purchaser of said thirty-six shares of said stock at its par value, to wit: the sum of \$1,800, the said stock was not worth the sum of thirty cents on the dollar of its par value, and that the said defendants well knew that fact. And the said plaintiff alleges and states that he has been injured by the said false and fraudulent statement and report, as made by the said defendants, as president and cashier of the said Mohawk Bank of Schenectady, of its conditions and resources, and he therefore demands judgment of \$1,500 against the said defendants for his damages, besides the costs of the action."

The complaint was duly verified.

"(Schedule A.)

Quarterly report of the Mohawk Bank of Schenectady, on Saturday, the 19th day of June, 1858:

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RESOURCES.

Loans and discounts.....	\$207,963 91
Overdrafts.....	5,635 54
Due from banks.....	129,389 29
Due from directors of the bank.....	\$3,024 82
Due from brokers.....	
Real estate.....	11,600 00
Specie.....	12,692 95
Cash items, viz :	1,038 37
Stocks, \$100,000 ; promissory notes,	100,000 00
Bonds and mortgages.....	10,200 00
Bills of solvent banks	5,500 00
Bills of suspended banks.....	
Loss and expense account.....	6,177 79
	\$490,197 76

LIABILITIES.

Capital	\$200,000 00
Circulation registered.....	\$83,999 00
Circulation not registered	
Total	\$83,999 00
Less notes on hand	\$23,616 00
Profits	60,293 00
Due to banks.....	7,803 05
Due to individuals and corporations other than banks	16,461 28
Due treasurer of the state of New York.....	
Due depositors on demand	252 00
Amount due, not included under either of the heads	205,388 43
	\$490,197 76

George G. Maxon, president, and Nicholas Swits, cashier of the Mohawk Bank of Schenectady, a banking association located and doing business at Schenectady, in said county, being duly and severally sworn, each for himself saith, that the foregoing is, in all respects, a true state-

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ment of the condition of said bank, before the transaction of any business on the morning of Saturday, nineteenth day of June, one thousand eight hundred and fifty-eight, in respect to each and every of the items and particulars above specified, according to the best of his knowledge and belief; and that the business of the said bank has been and is transacted at the location aforesaid.

GEORGE G. MAXSON, *President.*

N. SWITS, *Cashier.*

Severally subscribed and sworn
by both deponents, the fourteenth
day of July, 1858.

JAMES M. BOUCK, *Com. of Deeds."*

"The defendants demur to the plaintiff's complaint in this action upon the following grounds:

1st. That the complaint does not state facts sufficient to constitute a cause of action.

2d. That there is a defect of parties defendant in this, that the Mohawk Bank of Schenectady should be a party defendant."

At a special term of the supreme court, held at the court house at Sandy Hill, on the 8th day of March, 1859, present E. H. ROSEKRANS, *Justice*, after hearing Mr. Beach on the part of the defendants, and Mr. Sherwood on behalf of the plaintiff, upon demurrer to the complaint, judgment was ordered in favor of the defendants upon demurrer with costs: with leave to plaintiff to amend upon payment of \$25 costs.

The following opinion was delivered upon this decision:

ROSEKRANS, *Justice.* It may be assumed (although the fact is not alleged in the complaint,) that the Mohawk Bank of Schenectady was a banking association, organized under the general act, and that the defendant Maxon was president, and the defendant Swits, cashier of the bank. It is averred that the defendants, as president and cashier of said bank on the 14th day of July, 1858, made and

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published a quarterly report of the condition of said bank, as it existed on the 19th day of June, 1858, in pursuance of the requirements of section 125, title 2, chapter 18 of part 1 of the Revised Statutes; that this report falsely set forth that there was due from banks to the Mohawk Bank of Schenectady, \$129,380 $\frac{1}{100}$; that this statement was wholly false to the knowledge of defendants; that it was made with intent to deceive and defraud the holders and owners of the stock of said bank, and those who might become the purchasers and owners of such stock; that plaintiff, believing such statement true, and relying upon it, in September, 1858, purchased 36 shares of the stock of said bank at par value, (being \$50 per share,) and that said stock was not worth over thirty cents on the dollar of its par value. The defendants demur to the complaint upon the ground, 1st. That it does not state facts sufficient to constitute a cause of action; and, 2d. That there is a defect of parties defendant—in this, that the Mohawk Bank of Schenectady should be made a party defendant. The section of the statute under and in pursuance of which it is averred the defendants made and published the quarterly report referred to, only requires of the president and cashier of a bank that they shall verify by their oaths the quarterly reports of the bank. It contemplates that the report and verification, after the oath is made, shall be delivered to the bank. The bank to forward it to the superintendent of the bank department, and the superintendent is required to publish the statement in a newspaper printed in the county, city or town where the bank is located. (2 R. S., 5th ed., 432-3, § 125.) The report is not made or published by the president or cashier, pursuant to the act. It is made by the bank to the superintendent, and the publication is by the superintendent. But, assuming that the president and cashier can properly be said to have made and published the report pursuant to the act, it is difficult to understand how they can be made liable to the plain-

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tiff, as a subsequent purchaser of the stock of the bank from a stockholder, by reason of any false statement contained in the report. It is quite clear that the report is required to be made to the superintendent solely, to enable him to exercise the supervision over the bank and its affairs which is imposed upon him by law, and so enable him to determine what action he shall take to protect the rights of bill holders, stockholders, and those who may have dealings with the bank. (2 R. S., 5th ed., 442, 3, 4, § 125, 128, 181, 182 *and fol.*) The publication of the report by the superintendent is required to protect the rights of the same parties. The provisions of the statute referred to, are "regulations to prevent the insolvency of united corporations, and to secure the rights of their creditors and stockholders." They have no reference to those who have dealings with individual stockholders, but to those only who have dealings with the corporation. They are not designed to protect the rights of those who may purchase the stock of the bank of individual stockholders. The report is not made to them or for their benefit, nor is it designed to influence their action as purchasers of stock. They have, therefore, no right to rely upon it in their dealings with individual stockholders. If any fraud is committed by the bank or its officers, in making a false report, they alone, for whose benefit and protection the law is enacted, can avail themselves of the fraud. No intent to defraud, by the falsity of the report, or its publication, *pursuant to the statute*, can be alleged by any except a party whose rights were intended to be protected by the statute. A false statement made with intent to induce a party to act, and upon which he does act, and thereby sustains damage, will enable him to maintain an action. But the statement must, either in fact or contemplation of law, be made to the party who claims that he has been defrauded and brings the action, and it must be made with a view of inducing him to act upon it.

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A special letter of recommendation of an insolvent, as worthy of credit, given by a party who has knowledge of the insolvency, with the intent to induce the party to whom it is addressed, to give credit to the insolvent, and in consequence of which such credit is given, will enable the party defrauded to maintain an action for the damages which he has sustained. And a general letter of recommendation of credit of an insolvent, and like knowledge, and an intent to defraud any one to whom it may be presented, and who may act upon it, will be sufficient to maintain an action by any one who has given credit to the insolvent upon the faith of the letter of credit, and has sustained damage therefrom. The law regards the letter as addressed to and intended to influence the action of every one who gives credit to the insolvent upon the faith of the letter. (*Zobinski agt. Smith*, 3 *Ken. R.*, 332; *Allen agt. Addington*, 11 *Wend. R.*, 474.) *But when upon the face of the false statement, or from the circumstances under which it is alleged to have been made, it is apparent that the intent was to defraud a particular party, or class of persons, and none other, no one except the person, or one of the class intended to be defrauded, can maintain an action for damages arising from the falsehood.* Under the circumstances assumed, all other persons are apprised that the statement is not to them, or designed to influence their conduct, and if they rely upon it they do it at their peril. It is the result of their own folly, and the absence of an intent to defraud the plaintiff being apparent from the nature of the statement, or circumstances under which it was made, as *alleged in the complaint*, the pleading would be demurrable.

In this case, the complaint was that the making verification and publication of the quarterly report was in pursuance of the requirements of section 125 of title 2, chap. 18, part 1, of the Revised Statutes. At the time the report was made and published, the plaintiff was neither creditor, bill-holder or stockholder of the bank. The char-

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acter of the quarterly report, and the circumstances under which it was made, *as alleged in the complaint*, shows that it was not made to him, or for his benefit, or to induce him to act upon it. They negative the averment that the report was made with intent to deceive and defraud those who might thereafter become purchasers of the stock of the bank of individual stockholders. The plaintiff is not, therefore, entitled to maintain his action. (*Easigi agt. Mann*, 17 *How. U. S. R.*, 189, 199.)

The case is clearly distinguishable from those in which corporations and their officers and agents have published false statements in prospectuses or otherwise, to induce parties to enter into engagements with such corporations, and in which they have been defrauded. Such statements are regarded in law as addressed to and intended to influence the conduct of all who may deal with the corporations, on the faith of the statements put forth, and for the damages which result therefrom, the corporation and its officers are bound to respond. (*Moffat agt. Winslow*, 7 *Paige R.*, 124; *Gerhard agt. Bates*, 20 *E. L. and Eq. R.*, 129, 133; *National Exchange Co. agt. Drew*, 22 *E. L. and Eq. R.*, 1, 14; *Pentifox agt. Reynold*, 3 *Man. and Gr.*, 63.)

I think the complaint is defective also in not stating that the report was made and published with the intent to induce plaintiff to become a purchaser of stock of the bank, and that the general averment of an intent to deceive those who should become purchasers of the stock of the bank is not sufficient.

Judgment is ordered in favor of defendants upon the demurrer, with leave to plaintiff to amend on payment of \$25 costs.

The plaintiff thereupon appealed to the general term.

JOHN D. SHERWOOD and JOHN C. WRIGHT, *for plaintiff.*
WM. A. BEACH and THOMAS B. MITCHELL, *for defendants.*

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By the court—GOULD, Justice. I think the tendency of all the later decisions in this country and in England, is in favor of extending the liability of every one who makes a public representation which *he knows to be false*, and upon faith in which any one has been led into a business transaction, whereby he suffers damage. I do not understand that it is at all necessary to the right of action that the representations should have been intended for the party sustaining the loss, or in any way addressed to him. If it be made openly and publicly, so that it might well come to his ears, and if it does come to his ears, and *he acts upon it*, the party making it shall answer to him for the damages. He shall not be at liberty to sow falsehood broad-cast, without being responsible for the loss it causes.

A very late decision of the House of Lords was had in this case: The chairman of a mining company by falsely representing to the stock exchange that two-thirds of the shares had been taken and paid up, procured the stock to be entered on the official list.

A stranger seeing the stock so entered, and knowing the rule that no such stock was entered unless so paid up; and believing the fact to be in accordance with the representations, bought some of the stock on the exchange. It was held (affirming the judgment of the exchequer chamber,) that the purchaser had a right of action against the directors, for the fraudulent representations. (*Law Reports July, 1859, XXI., p. 160.*)

In the case before us, it is averred that the president and cashier of the bank, (leaving out the oath to their statement as mere surplusage,) made and published a statement of the condition of the bank, on a given day, which statement was to their knowledge grossly false, giving the particular item which was untrue.

The complaint adds that this statement was made and published "in pursuance" of certain statute enactments. If in other respects this averment came up to the prin-

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inciple I have stated, I consider it of no sort of consequence what the provisions of the statute were, or whether or not there were any statute on the subject; all that is required is the falsity of that statement, (known to the makers of it,) provided the statement be *so made* that it came properly to the plaintiff's knowledge and *he relying upon it* sustained damage thereby.

That, in fact, it was made to a public officer, and in a way to ensure its publication in a conspicuous and official manner, may well be grounds for holding that it was intended to deceive the *public*; but I do not see that *therefore* the defendants are any the less guilty of fraudulent misrepresentations. Nor does it seem to me of any consequence that the *statute* referred to had for its object something entirely different from protecting the plaintiff or the *public* against the kind of injury which the plaintiff has sustained.

The falsehoods may have been *made* for *one* purpose, and published for that; but *being published*, the *public* or any individual of the *public* has a right to *believe* it. It must have been the intention of the persons publishing it that it should be believed. And if believing it any one of the *public* acts on that belief, the makers and publishers of this falsehood are to be held liable for the consequences *they have caused*.

It seems to me refining too technically to say that the defendants made the report to the *bank*, and the *bank* to the *superintendent*, and the *superintendent* published it. Granting that true, the *bank* did not *tell the falsehood, &c.*; the persons who did, knew and intended the use to which this falsehood was to be, and was put. It is but one remove further off in the regular and usual chain by which the completed act was done. At any rate, the *complaint charges* that the defendants made and published the statement, and the case comes here on demurrer conceding that they *did so*.

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The averment of *intent* in the complaint is "with intent to deceive and defraud those who might become purchasers and owners of the stock." This certainly is not so general as that the intent was to deceive and defraud the public. And yet, under the decision I have cited, a mere *stranger* to the making of the representations could have alleged *no other intent* than to deceive the public, and himself as one of the public. I should hold under our Code that the intent was sufficiently averred to authorize a recovery.

It seems to me that the ruling of the learned judge who gave the special term decision, (whose opinions are always entitled to great respect,) is not according to the present views of our courts, and I shall be in favor of reverting his decision.

HOGEBOOM, J., concurred.

WRIGHT, J., being in court of appeals, gave no opinion.

NOTE.—It has been settled in all the courts of England and of this country, that the officers and directors of a company making false statements or representations which they know to be false, that become public, as to the organization, capital or condition of the corporation, are liable to any stranger coming to a knowledge of such false statements or representations, and suffering loss or damage by purchasing stock or dealing with the corporation *on the faith of such statements or representations.* (*Bedford* agt. *Bagshaw*, 22 *Law Rep.*, 168; cited in the foregoing opinion by Judge GOULD; *Bagshaw* agt. *Seymour*, 93 *Eng. Com. Law R.*, 873, 45; *Johnson* agt. *Goslett*, 3 *Com. Bench R.*, 569-575; *National Exchange Co.* agt. *Drew*, 32 *Eng. L. and Eq. R.*, 10; *Colt* agt. *Wollaston*, 2 *P. Wms.*, 154; *Green* agt. *Barrett*, 2 *Simons*, 48; *Jones* agt. *Garcia Del Rio*, 1 *Tur. and Russ.*, 297; *Blair* agt. *Adair*, 1 *Simons*, 37; 2 *id.* 289; *Gerhard* agt. *Baley*, 20 *Eng. Com. L. R.*, 130; *Colman* agt. *Riches*, 29 *Eng. L. and Eq. R.*, 323; *The Charitable Corporation* agt. *Sutton*, 2 *Ath. R.*, 401-1742; *Hutchins* agt. *Congreve*, 4 *Russ.*, 512; *Walburn* agt. *Ingrilby*, 1 *Miles and Keone*, 61; *Fass* agt. *Harbottle*, 2 *Hare*, 401; *Paisley* agt. *Freeman*, 3 *Term R.*, 51; *Pontifex* agt. *Reynolds*, 3 *Scott's N. R.*, 390; *Blount* agt. *Scott*, 2 *Scott's N. R.*, 588; *Gallager* agt. *Brunel*, 6 *Cow.*, 246; *Allen* agt. *Addington*, 7 *Wend.*, 9; *Bailey* agt. *The Mayor*, 4*et seq.*, 3 *Hill*, 531; *City of Buffalo* agt. *Holloway*, 3 *Seld.*, 493; *Culver* agt. *Avery*, 7 *Wend.*, 384; *Upton* agt. *Vail*, 6 *John.*, 181; *Barney* agt. *Dewey*, 13 *John.*, 224; *Williams* agt. *Wood*, 14 *Wend.*, 126, 16 *Paige*, 339; *Dodge* agt. *Woolsey*, 18 *How. U. S. R.*, 28; *Robinson* agt. *Smith*, 3 *Paige*, 230; *Gardner's Institutes*, 220-223; *Mead* agt. *Math*, 16 *How. Pr. R.*, 347; *Cross* agt. *Sackett*, 16 *How. Pr. R.*, 62.)—*Rep.*

People agt. Mayor, &c., of New York.

SUPREME COURT.

THE PEOPLE OF THE STATE OF NEW YORK, and JAMES B. TAYLOR, and OWEN W. BRENNAN agt. THE MAYOR, &c., OF NEW YORK, and others.

Hold, in this case, 1st. That the lease granted by the commissioners of the land office in the name of the people of the state, at a rent of less than one-tenth the value of the term, taking of indemnity against costs, and giving an inconsistent covenant for quiet enjoyment, was confessedly, on its face, the lease of a law suit, in violation of the spirit, if not the letter of the statute of chancery, and therefore void.

2d. That although the people, through their representatives in the legislature, can make that legal, which, by the general law is illegal, their executive functionaries intrusted with special limited duties have no such dispensing power. The unauthorized use of the name of the people does not make the deed the act of the people.

3d. That the lease, had there been no adverse possession, was equally void as "a grant of land under water," made not for "the promotion of commerce," but for the mere emolument of private individuals.

4th. That it was void also as a grant of land under water to persons other than the proprietors of the adjacent lands.

5th. That the lease being void, the lessees had no standing in court to call in question the title of the city, or its mode of management.

6th. The alleged conversations of individual members of the city government, (even if not denied, as they substantially were,) are no evidence in law to determine or to divest the city's title to its real estate of which it is confessedly in possession, which was in effect created by the city, and of which the city claims to be the owner *in fee*.

7th. That the judgment by default, and the proceedings upon it, were in the nature of a *collective affirmatum*, made by tenants to the prejudice and without the consent of their landlord, and therefore void.

8th. That the defendants having made a clear case of *meritis* on their part, as well as of demerits on the part of their adversaries, are entitled on that ground to have the *defacti opened*, and to be allowed to defend.

9th. That the judgment entered against all the respective occupants is *solido*, for the aggregate rental of the whole premises, notwithstanding the implied admissions in the complaint, instead of a judgment for costs in favor of all the defendants but one against the plaintiffs, was contrary to law.

10th. That the *default allowed by one of the defendants while holding a substitution in his hands, in collusion with the plaintiff, was a fraud upon the other defendants*, and should for that reason, were there no other, be opened, and all the proceedings founded on it set aside. (It will be seen that this opinion takes a different view of some of the questions involved from that reported in *s. c. 17 How. Pr. R.*, 56.)

People agt. Mayor, &c., of New York.

New York Special Term, July, 1859.

THIS was a hearing on an order made on the 6th June, 1859, that the plaintiffs show cause why the trial and judgment in this action should not be set aside, why the receiver therein should not be discharged, and the possession of the property in question restored to the defendants, the mayor, aldermen and commonalty of the city of New York; and that on passing his account, the balance in the hands of said receiver of the rents of the said property be passed over to the said city, and why the default therein as to the defendants other than the said city should not be set aside, and why the said city should not be authorized to defend said action for said other defendants, if necessary, &c.

RICHARD BUSTEED, corporation counsel.

Wm. CURTIS NOYES and JOHN McKEON, for the motion.

WALDO HUTCHINS, E. W. STOUGHTON and JOHN VAN BUREN, for the plaintiffs, opposed.

ROOSEVELT, Justice. The corporation of the city, it appears, having filled in the plot of about four hundred and sixty feet square, constituting the water front of the old Washington market, and constructed a bulkhead and piers in connection with it, gave permits from time to time to various persons, more than one hundred and eighty in number, to erect upon it temporary sheds for the sale of meats and vegetables; the respective occupants paying, as the complaint avers, a "weekly sum for rent" or the use thereof.

On the 24th day of April, 1858, while the city was thus in possession of the premises, claiming the ownership and receiving from them a revenue in the aggregate \$50,000 per annum, the commissioners of the land office, in the name of the people of the state, for reasons not very satisfactorily explained in the papers before the court, and

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seemingly without notice to the city authorities, executed to James B. Taylor and Owen W. Brennan, two of the plaintiffs, a lease of the whole plot at a rent, for one year, of \$5,000, and with a covenant, if valid, binding the state to maintain them, the two lessees, in peaceable and quiet possession.

Immediately upon the execution of this lease, Taylor and Brennan, in their own names alone, instituted an ejectment or quasi ejectment against the city, and its one hundred and eighty tenants, to indemnify themselves for the \$5,000 payable by them into the state treasury, by withdrawing ten times that amount, and more, from the treasury of the city—a not unimportant portion of the state.

The complaint in its original shape, being soon found to be defective, an amended one was filed, making the people of the state co-plaintiffs, and praying, among other things, in addition to "the rendering of *possession* to the plaintiffs (that is, the people and Taylor and Brennan) or to such of them as shall be declared entitled thereto," that the defendants may be adjudged "to pay to them jointly or severally the sum of *one hundred thousand dollars* damages for the rents, issues and profits, whilst the same have been unlawfully withheld from the plaintiffs."

This complaint is verified by James B. Taylor; but instead of being subscribed as usual by one name or firm as "attorneys for the plaintiffs," it purports to be signed by the attorney general for the people, and by other attorneys for Taylor and Brennan.

On the 15th of February, about nine months after its commencement, with the consent of the attorney for the city, and on motion of the attorney for Taylor and Brennan, nothing being said in the order as to any motion or consent on the part of the people, the other plaintiffs, the suit, as against the city, ("costs having been paid") was discontinued—so far at least as such an order could have that effect.

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Having thus disposed of the city, the only real party to the controversy, and having made some arrangement, as may be inferred, with one or more of the other defendants, the precise nature of which does not appear, the plaintiffs on the 13th of May, 1859, brought the cause on to a nominal trial, their adversaries, as the order expresses it "having, *by failure to appear*, waived a trial by jury," and the judge "*therewpon* found and directed judgment to be entered as follows:" in substance *first*, that one set of plaintiffs, to wit: the people, recover possession of the land; *second*, that the other set, to wit: Taylor and Brennan, having been previously entitled to the possession of the premises for the year just expired, recover possession of the *rents* for that period, adjusted at the sum of sixty-nine thousand one hundred and eight dollars and forty-five cents, to be paid by "*the defendants*," not proportionately and respectively, but *in solidis* (that being the legal effect of the terms), "*as damages for the withholding of the possession of the premises from the plaintiffs (Taylor and Brennan,) from the 1st of May, 1858, to 24th of April, 1859.*

It will thus be seen—without reference to another feature in the transaction which I shall presently advert to, that Taylor and Brennan in one year recover in round numbers \$70,000, on an outlay of \$5,000, and that the city at the same time is dispossessed of the same amount of revenue, and of the fee of a property, which by the plaintiffs' showing is worth more than a million, without a trial, and after the plaintiffs, or two of them at least, had voluntarily discontinued the suit, as against the city and admitted it to be unfounded, by "*paying the costs*" of the defence. Nor is this all—the tenants, so called, the mere temporary occupants "*respectively*" of distinct and separate moveable shanties, are made liable, not each for his own occupancy, but each for the whole plot, to the seemingly enormous *ex parte* assessment of \$70,000, and that

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too after they had already, by an interlocutory proceeding, as will presently be shown, been directed to pay their respective rents for the same identical period to a receiver appointed by the order of the court, made at the instance of the plaintiffs themselves.

The statute too provides (2 R. S., § 307,) that when an action is against several defendants, if it appear on the trial (as it must necessarily have done in this case), that any of them occupy distinct parcels in severalty or jointly, and that other defendants possess other parcels in severalty or jointly (that is singly or in groups), the plaintiffs shall elect, at the trial, against which he will proceed; which election shall be made before the testimony in the cause shall be deemed closed; and a verdict shall thereupon (as a sort of penalty) be rendered *for the defendants not so proceeded against.*" In other words, if a plaintiff, as in this instance, shall bring an ejectment against a multitude of persons not holding in common, but in distinct and separate parcels, he shall, instead of recovering against all, pay the costs of all except one.

The well known existence at the time of such a provision of law, together with other circumstances already in part alluded to, demonstrates that the judgment complained of must have been the result of collusion, accident, mistake, or fraud. A tenant, whether by his own direct act or by a collusive judgment, has no right or power to surrender the possession of his landlord to a stranger against his landlord's consent. (1 R. S., 744.) A fraudulent attornment is none the less fraudulent and none the less void by being invested with the habiliments of a sham judgment, which itself in such case is one of the strongest indicia of collusion.

It is to be observed that this judgment was obtained notwithstanding that the defendants only a few days before had able and faithful counsel; and was obtained by default, and in its present extraordinary and illegal form,

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notwithstanding that those counsel, as the plaintiffs themselves show, were paid *nine hundred dollars* to watch over the interests of their clients. And it is further to be observed that, notwithstanding the seemingly onerous and certainly most irregular form of the judgment, one of the very defendants, against whom it stands on the record, is found making an affidavit to resist the motion, to vacate the entry, and to let the parties in to defend their rights.

But the case does not stop here. On the very day of filing the first complaint, and before the name of the people was inserted in the proceedings, the plaintiffs obtained from one of the judges an order, usually very much a matter of course, requiring the defendants to show cause, not before him or before any one of the judges who might be present at chambers, but before another and a particular judge by name, why an injunction should not be issued and a receiver appointed to take charge of the premises and collect the rents. Although this notice of motion (an order to show cause is in substance nothing more) was returnable on the 17th day of May, 1858, three days after its date, yet, for some reason unexplained, no hearing upon it was had till the 29th of June, and no decision till the 2d of August,—clearly showing that the necessity for a private receiver as against the ample guaranty of the city treasury, and that too in an ejectment suit, was not very pressing even if the right had been undisputed, as it certainly was not, and as the admissions in the present argument show it could not be. A receiver in an ejectment suit is confessedly, in any case, a novelty—in a case where there is nothing to be injured and (the city of New York not being quite yet insolvent) nothing to be lost, it is, I conceive, without a precedent—for even the one made by the special term order in the present instance was overruled, as I am informed, at the general term, although the decision, in consequence, it is said, of the supposed discontinuance above referred to, was never formally pronounced.

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On the 2d of August nevertheless—erroneously as the written opinions of the general term subsequently showed—a receiver (Mr. Cyrus Curtiss) was appointed, during the pendency of the action, and until the further order of the court; first giving security in the sum of \$20,000, and with directions to pay all moneys into the United States Trust Company, to be drawn out only on a judge's fiat, as the court should from time to time direct.

Before, however, any action was had on this appointment, the city authorities conceiving the order to be erroneous, appealed from it to the general term, and on the 4th of August, pending the appeal, applied to another judge, as the practice permits, and obtained a stay of proceedings, without security, till a decision on the appeal could be had. On the 13th of the same month another order modifying the previous one was obtained, allowing the receiver "to collect the rents," but without prejudice to any motion to be afterward made, &c. Mr. Curtiss, accordingly, with limited powers, entered partially upon the duties of the office of receiver. He was "at liberty (as the order declared) to collect the rents," until the decision of the general term, unless even this "allowance" should previously to the hearing be "vacated" by "any of the justices of this court."

Judge CLERKE, it is obvious, had great hesitation in modifying his absolute stay of proceedings, even to the above extent, and he finally concurred in reversing the order of the 2d of August for an injunction and receiver, altogether.

Much of the present difficulty would have been obviated had that reversal, like others at the same term, been duly announced and entered of record before the discontinuance of the 15th of February. I see no reason, however—none that is insuperable—why the reversal actually agreed on by the court may not now be entered, *nunc pro tunc*, according to the facts, as of November, 1858.

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Should, however, the order appealed from not be vacated in the manner indicated, the question will present itself, and it must prospectively be considered, what was the effect upon it of the partial discontinuance of the suit itself, after the order appointing a receiver in the suit and the actual appointment under it were made.

It is quite obvious, as it seems to me, that the intention of the corporation counsel, in consenting to a discontinuance, exacting costs as a condition precedent, and of the counsel of the plaintiffs, in *paying the costs*, was, that so far as the city was concerned, matters should be restored to their *status quo*, and stand thereafter precisely as they stood before the commencement of the suit. Without a suit against the city no receiver against the city could have been appointed. The order would not have been merely erroneous but void. Striking out the city therefore was striking out the order—and a judicial declaration therefor, for the guidance of the receiver as an officer of the court, may properly be made to that effect. Such a declaration would not be a reversal by one judge of the order of another judge. It would be simply an adjudication that the parties, by their own subsequent acts, had taken from under the order, the basis on which it rested, and as a consequence that the order fell. In such a proceeding there is no unfitness or interference.

The order of the 2d of August had moreover been temporarily modified or suspended by Judge CLERKE. This he was authorized to do, pending an appeal, by express statute. Mr. Curtiss never was, therefore, put in possession of the premises, or authorized "to take charge of, or to let the same." All proceedings in that direction were "stayed." He was "at liberty to collect the rents," meaning of course the rents on antecedent lettings by the city, and not to make new leases himself. He occupies consequently the position of a sheriff, who has received moneys under an attachment, in a suit subsequently discontinued

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before judgment, and who of course must refund them to the defendant to whom they originally belonged. For greater caution, perhaps, like the sheriff, he would require, and would be justified in requiring, an order to that effect. But such an order would only declare, not give, rights. As to the *land* itself, the receiver having no possession himself, could give no possession to others; and the tenants owing a duty to their landlord, the city, and having received possession from the city, could only attorn to a stranger by first obtaining the city's consent. An attornement of their own will, without such consent, is regarded in law as an act of quasi treason, and therefore void.

The receiver consequently obtained no possession of the land, by the order of the court or by the act of the tenants. The one was suspended and is so still; the other had no legal existence from the beginning.

As to the judgment which was allowed to be entered by defendant, I have shown I think already, that it contains on its face the most unequivocal intrinsic evidence of collusion between some of the plaintiffs, and some, perhaps only one, of the defendants, abundantly sufficient to set it aside as against the city, and all the defendants not implicated in the arrangement. There is, however, an additional circumstance no yet adverted to, which naturally strengthens this conclusion.

The same one of the defendants who, and who alone, in June, 1858, verified under oath an answer in opposition to the plaintiff's claims; and who, in June, 1859, presented an affidavit, similarly verified by himself, in support of their claims, was furnished, *two days before* the so called trial of the cause, with a written substitution in blank, to be filled up at his discretion, signed by the then attorneys of all the defendants except the city, they receiving from him at the time (contributed by whom it is not stated by him) the liberal compensation as already shown of \$900 for their past services. This substitution in blank, (I

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quote his own affidavit) he kept and still keeps unacted on in his pocket—showing conclusively that its sole object, as understood at least by himself, was to discharge one attorney and not to provide for another—in other words, to let his apparent adversaries quietly take by default any judgment in any form they might see fit, not only against himself but also against all his confiding associates, and against the city too, if its effect be such as is now contended for by plaintiff's counsel.

It is urged as a reason among others why the court notwithstanding should not interfere with the plaintiff's proceedings, that the affidavits and papers "clearly show that the city has no title to the premises." If that be so, it must be quite as clear that the execution of a lease by the state officers to two private individuals, for those same premises, yielding a rent of \$70,000 and upwards, for \$5,000, to the prejudice of a city constituting an interest of more than one-fourth of the state, and that too, as far as appears, without any public notice, was a very extraordinary measure. But the state officers, it appears, if we may rely on their report to the senate, were not quite so clear as the counsel. They exacted, they say, from Taylor and Brennan, by authority of what law is not stated, before giving the lease, a bond to indemnify the state against all costs and expenses incurred in any and all actions that should be brought to test the title to the demised premises—thus in effect admitting that there was an adverse possession at the time, and that the city if sued might establish its title.

They add also, to show their knowledge of the subject, "It is understood by the commissioners, that the title of the state to the land rests upon the ground that said lands have been made filling in the Hudson River, *without cost to the state below high water mark*, and beyond the boundaries of any lands that had been previously granted either by the ancient charter of New York, or by any subsequent

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grant; that said lands having been formed by additions made to the bed of a public navigable river, the title thereto is vested in the people of this state. This title, however, is disputed by the persons claiming in hostility to the state, but upon what grounds these claims are based the commissioners are not fully informed." Had they extended their researches the commissioners would probably have ascertained that the city indubitably owned the land at least to (and 400 feet beyond) *low* water mark, and of course several feet beyond the "high water" line. (See the charter.)

They might also have ascertained or at least have discovered some probable ground for supposing that the city not only owned to that extent the land under water with the right of building on it, but with "all and singular the benefits, easements, advantages, &c., thereto belonging or appertaining," including not improbably the right of wharfage and navigation and other uses of the water in front, to the exclusion of course of any right in the state, without just compensation, to deprive the city of these appurtenances and lease them to another, especially if such lease were not for "public use," but mere private emolument. It may be that the filling in, if any, beyond the outer line fixed by law, wherever that line may be, was an injury to navigation, and as such a purpresture and public nuisance, for which the city, if it occasioned any serious injury to the general public, might have been indicted by the state, and which, if practicable, the city may perhaps have been compelled, not by the fiat of the land office but by the will of the legislature, to remove—for that or for any other reason, (*Lansing agt. Smith*, 4 *Wend.*, 9.) But did the ground formed by the encroachment constitute state *land*—improved state *land*—which the state officers could *lease* to private individuals, and not for the removal of the nuisance if it was one, but for the continuance of it, to be

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built upon and occupied to their profit and to the prejudice of the city?

The right of the state to the substratum of a navigable river below low water mark, and four hundred feet beyond, does not, as it seems to me, come within the words "lands belonging to the state," (1 R. S., 198,) which the commissioners of the land office are authorized "to lease for terms not exceeding one year." To warrant such leasing the law not only requires that the subject of the lease should, in the ordinary sense of the expression, be "lands belonging to the state," but "*such lands*, belonging to the state, as have *improvements* on them," and those improvements too, justly and equitably *the property of the state*, as well as the land on which they were made. What color of authority then was there for the lease on which this action is founded? As it appears to me, none. Even the counsel who framed the amendments to the plaintiff's complaint, has impliedly signified an opinion to that effect. In the first clause, as amended, he avers the right of the state to the possession of the premises, "*unless a certain lease thereof to James B. Taylor and Owen W. Brennan, hereinafter more particularly referred to, be valid.*" In the same clause he alleges that the corporation of the city have taken possession thereof, "*and, unless said lease be held valid, withhold from the people the possession to their great damage.*"

In the third clause he avers that "*under said lease, if the same be held valid, the plaintiffs, Taylor and Brennan, became lawfully possessed of the premises.*" Such language and such frequent repetition of it, are not usually characteristic of counsel entertaining a clear conviction of the solidity of their clients' pretensions.

To make the argument still stronger, however, there is an express statute specially on the subject "of grants of land under water," (1 R. S., 208,) applying equally to leases for one or more years, as to conveyances in fee.

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"The commissioners of the land office (says that statute) shall have power to grant in perpetuity, or otherwise, so much of the lands under the waters of navigable rivers or lakes, as they shall deem necessary *to promote the commerce of this state, or proper for the purposes of beneficial enjoyment of the same by the adjacent owners*; but no such grant shall be made to any person other than the proprietors of the adjacent lands; *and any such grant that shall be made to any other person shall be void.*"

The grant therefore to Taylor and Brennan, out of which this litigation has sprung, and on which the injunction and receivership, and final judgment rest, is a direct violation of law, and not only of dubious validity, but absolutely void. Whatever, consequently may be the title of the city—and it certainly is not to be determined, as in this case has been attempted, by the loose conversations, inaccurately reported, of corporate officials—whatever, I say, may be the city's title, Taylor and Brennan it is clear are not authorized to call it in question. *They have no standing in court.*

So much for the state's grantees. As to the grantors or rather the assumed agents of the grantors, their opinion on the subject, as already observed, may be measured by comparing the \$5,000, for which they sold the right for one year, with the \$70,000 which they say they "proved" the rents for one year (on the trial) to be worth.

There is still another objection to be considered. This suit, it is apparent, although the name of the people has been made use of, was commenced for the benefit of individuals. Now the statute on the subject of "actions of ejectment in the name of the people" expressly declares (1 R. S., 180) that no such suit shall be commenced for the benefit of an individual without the consent of the attorney general, and no such consent shall be given by the attorney general, unless the individual desirous to prosecute the suit, shall give security (not to the people,

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but to the defendant) for the payment of the taxable costs, in case the suit shall be determined in favor of the defendant." It is made "the duty" also of the attorney-general (§ 1) "to prosecute and defend all actions in the event of which the people of this state shall be interested." Here, no such consent was given or applied for, and of course no such duty performed till long after "the name of the people" had been inserted in the complaint, and after the complaint had been matured into a judgment. And I do not admit that in the case of a public officer with powers strictly defined by law, an *ex post facto* consent, given not by the principal, but by the agent, can make that valid which before was void. Nor do I see how the attorney general was to discharge "the duty" of "prosecuting," while he has no knowledge of the pendency of the prosecution. The name of the people, it appears, and of the attorney general, was first used in obtaining the injunction of the 26th of May, 1858. A year or thereabouts, after that date in answer to "a resolution of the senate," he reported that no such action had been commenced by him, or by his authority, nor had he charge of any such action. He adds, however, that "*on examination* of the proceedings of the commissioners of the land office"—showing that he had no knowledge of the matter before—"he finds a resolution entered in the minutes, authorizing a distinguished member of the bar by name, to take charge of the interests of the state in the action brought to recover the possession of lands known as West Washington Market, at the expense of the lessees."

Under what law such a resolution was passed I am unable to discover. The attorney general himself, in case of necessity, is undoubtedly "authorized to employ additional counsel" (1 R. S., 181, § 17), but a resolution of the land commissioners, although he be one of the members of the board, especially if he was not present (and the law, as it does, gives all the powers to the majority),

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is clearly not "an employment *by the attorney general*." It is an employment, if at all, by the board, as a board, and not by either of its *ex-officio* members in their distinct and separate capacities. And how could private counsel, thus employed without the knowledge of the attorney general, and without informing him of the existence of the suit, be said to be "counsel additional to him"? The resolution referred to was therefore a nullity, notwithstanding the action of the attorney general on the 8th of June last. His *post mortem* letter of that date, "consenting that the action be continued in the name of the people," cannot resuscitate a dead proceeding, and one which never had any vitality. All the important steps in the suit—the complaint, the injunction, the receiver, the *ex parte* trial, the judgment, the execution, the dispossession—all were prior to the date of that consent, and were therefore all illegal and void as against both the city and the state, and it was not competent to the attorney general, by any *ex post facto* volition on his part to prevent their being so declared, or to deprive the city of its rights resulting from their invalidity. They were void—not voidable. There was no power in the *land board* prospectively to dispense with the *attorney general*, and no power in the *attorney general*, retrospectively, to dispense with *himself*. The consent of the attorney general on the 8th of June, that the action—meaning of course so far as anything after that date was to be done—should be *continued* in the name of the people, was no doubt sufficient to warrant any *subsequent proceedings*. But his "desire" accompanying it, "that no objection based upon the allegation of any want of authority to prosecute said action in the name of the people as plaintiffs should prevail," although entitled to the most respectful consideration, as a matter of courtesy, can have no retroactive effect, as a matter of law. The law of the land and the rights of parties are superior alike to the "desires" and "consents" of public officers, however exalted. They

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can neither dispense with the one, nor divest or interfere with the other.

Counsel have cited a section of the act in relation to the office of attorney general (1 R. S., 181), in which an incidental allusion occurs to actions of ejectment "brought by the attorney general, or by the sanction of the commissioners of the land office." I see no incongruity, however, in allowing the commissioners, in certain cases, to *direct* suits, and at the same time by another section providing that such suits when so directed by the commissioners, shall be "prosecuted" by the attorney general, and by him alone; unless *he*, and not the commissioners, shall see fit, by reason of the press of other official duties, to employ "additional counsel." If this view of the law be correct—and I see no reason to doubt it—the appointment by the commissioners of private counsel "to take charge of the interests of the state" in this action, was an oversight, and gave no authority to the distinguished appointee, beyond what he derived from his individual clients. The people, consequently, as a matter of law, were not represented in the suit, and incurred no obligations, and acquired no rights, either from the order in question, or from the undefended judgment that followed upon it.

But the commissioners had no authority to "direct" an action in the present case, no matter by whom conducted. "The general care and superintendence of all *lands* belonging to the state" (1 R. S., 198), interpreted by the whole scope of the statute, is a power clearly having no application to the bed of the *Hudson River*.

It means lands in the common acceptation of that term—lands wild or improved, of which the state was the original owner, or to which it has become entitled by foreclosure, or purchase, or contract, or gift. It surely could never have been contemplated that by the use and by the mere force of these general expressions, the commissioners of the land office were to "survey" or "sell" or "grant"

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or "lease" *the bed of the Hudson River*, "for the promotion of the settlement thereof," taking care to observe the injunction "not to sell more than twenty thousand acres at any one auction, and to expose to sale each lot separately" (1 R. S., 201), or that they were to direct ejectment suits to preserve the bed of the Hudson from obstruction any more than that they were to preserve it from obstruction by granting leases to private individuals, with liberty, by implication, to fill it up and build on it themselves, or to build on the filling already done at the expense of the city.

"Actions of ejectment brought by the direction of the commissioners of the land office," means, necessarily, actions which the commissioners were authorized *by law* to direct the attorney general to commence and prosecute. This was not such an action. It was not an incident to the power of taking "care of the lands of the state." Lands under water were not the lands intended by general provisions. They were provided for, as we have seen specially in a distinct article, containing no authority, express or implied, to direct an ejectment for what the law denominates a nuisance or purpresture—a wrong if seriously prejudicial to be redressed by the legislature, or perhaps by the grand jury; certainly not by the land office.

The direction, moreover, if given, was a direct violation of the spirit of the statute of champerty and maintenance. Its object and intent was to give effect to the lease. That lease to the extent of the term embraced in it, was the sale, not by the people or its legislative representatives, but by executive officers with defined and limited powers, of "a pretended right or title," to lands of which the grantor was not "in possession," and we can hardly presume that the legislature, without express language to that effect, intended to authorize public officers to do an act, essentially wrong in itself, and as to which, by a general law, they have declared that "no person" should do it,

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and that every person "violating the commandment should be deemed guilty of a misdemeanor." (2 R. S., 691.)

From what has been said, and from other arguments which will readily suggest themselves, the following propositions may be deduced:

1. That the lease granted by the commissioners of the land office in the name of the people of the state at a rent of less than one tenth the value of the term, taking a bond of indemnity against costs and giving an inconsistent covenant for quiet enjoyment, was confessedly, on its face, the lease of a lawsuit, in violation of the spirit if not of the letter of the statute of champerty, and therefore void.

2. That although the people, through their representatives in the *legislature*, can make that legal which, by the general law is illegal, their executive functionaries intrusted with special limited duties have no such dispensing power.

The unauthorized use of the name of the people does not make the deed the act of the people.

3. The lease, had there been no adverse possession, was equally void as "a grant of land under water," made not for "the promotion of commerce," but for the mere emolument of private individuals.

4. That it was void also as a grant of land under water to persons other than the proprietors of the adjacent lands.

5. That the lease being void, the lessees had no standing in court to call in question the title of the city, or its mode of management.

To warrant the appointment of a receiver before judgment, the code requires (§ 244) that the party shall "establish an apparent (that is, a *prima facie*) right to the property which is the subject of the action, and which is in the possession of the adverse party;" "and," also, that he shall establish, as matter of fact, that "the property, or its rents and profits, are in danger of being lost or materially injured or impaired."

Taylor and Brennan did neither.

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No injury to the *shanties* was pretended, and if it had been, the injury was no wrong to the plaintiffs. And as to any loss of *rents*, the metropolitan city of the United States being responsible for the *value* of the use, whether more or less than the actual receipts, the security, it may be presumed, was not less ample than the individual bond for \$20,000 of a private receiver.

6. The alleged conversations of individual members of the city government (even if not denied as they substantially were) are no evidence in law to determine or to divest the city's title to its real estate of which it is confessedly in possession, which was in effect created by the city, and of which the city claims to be the owner in fee.

7. That the judgment by default, and the proceedings upon it, were in the nature of a collusive attornment made by tenants to the prejudice and without the consent of their landlord, and therefore void.

8. That the defendants having made a clear case of merits on their part, as well of demerits on the part of their adversaries, are entitled on that ground to have the default opened, and to be allowed to defend.

9. That the judgment entered against all the respective occupants *in solido*, for the aggregate rental of the whole premises, notwithstanding the implied admissions in the complaint, instead of a judgment for costs in favor of all the defendants but one against the plaintiffs, was contrary to law.

Even if the complaint did not admit the separate occupancy in distinct parcels, the affidavits show the fact indisputably, and that it would be established on the trial, should a real trial be had.

10. That the default allowed by one of the defendants while holding a substitution in his hands, in collusion with the plaintiffs, was a fraud upon the other defendants, and should for that reason, were there no other, be opened and all the proceedings founded on it set aside.

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An order will accordingly be entered (its form to be first settled by the court) to the following effect:

1. That the order of the 2d of August, granting an injunction and appointing a receiver, be cancelled or vacated, and the rents collected under it, accounted for before a referee, and the balance paid over by the receiver on passing his account to the city, and deposited in the treasury.
2. That the default taken at the circuit in consequence of the failure of the tenants, be opened; the judgment entered thereon vacated, and the execution and all subsequent proceedings, including the attornments, if any, signed by the occupants, be set aside.
3. That the order of discontinuance irregularly entered without the consent of the people, on the supposed consent of all parties and on the implied, conditional and misapprehended or misapplied consent of the corporation counsel, either be discharged and the city re-instated as co-defendant in the action, or if not, that the city be allowed as the sole party to defend, in the place of, and without regard to their nominal, and in some respects disloyal tenants, whose "weekly" occupancy as existing at the commencement of the suit has necessarily long since expired.
4. That for greater caution an injunction issue restraining the occupants from paying to the plaintiffs, or the receiver, and the plaintiffs and the receiver from collecting of the occupants, any rents or moneys whatever, for the use or occupancy of the premises in question until the further order of the court.

Powers agt. Bassford.

NEW YORK COMMON PLEAS.

EDWARD J. POWERS agt. ABRAM BASSFORD.

Where in an action to recover the value of personal property, which has come to the defendant's possession lawfully, to entitle the plaintiff to recover, it is necessary for him to show affirmatively a demand of it before suit brought, and a refusal to deliver, or that the defendant has so disposed of it, that it is not in his power to deliver it.

New York General Term, July, 1859.

DALY, BRADY and HILTON, Judges.

APPEAL from a judgment at special term.

By the court—**HILTON, Judge.** The plaintiff sued to recover the value of an abstract of title, and a map of certain premises in New Jersey, loaned by him to the defendant, and alleged to have been converted.

As the property came lawfully into the defendant's possession, to entitle the plaintiff to recover, it was necessary for him to show affirmatively a demand of it before suit brought and a refusal to deliver, or that the defendant had so disposed of the property, that it was not in his power to deliver it. (*Graham's Practice*, 89; *Laplaet agt. Aapoix*, 1 *John. Cases*, 406; *Storm agt. Livingston*, 6 *John. R.*, 44; 3 *Black. Com.*, 152.)

This was not done. The testimony was merely that he had demanded the map and abstract several times, and each time the defendant said he would get them for him.

Whether these demands were before or after suit brought did not appear, and as a demand and refusal even is no evidence where it is apparent the defendant has made no conversion, (*Bullers Nisi Prius*, 44.) I think the production and delivery of the abstract at the trial, warranted the justice in assuming that the demand was made subsequent to the commencement of the action, and that in

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respect to the abstract, the evidence of conversion by the defendant was insufficient. In the language of Justice BLACKSTONE, *Supra*, the "*conversion must be fully proved.*"

As to the map, the testimony showed that it would not have any value except to the owner of the land delineated upon it, and as it was not shown that the plaintiff was such owner, the justice very properly awarded him nothing for it. (*Donohue agt. Henry*, 4 E. D. Smith, 162.)

Instead of a judgment in favor of the plaintiff, for nominal damages, had it been for the defendant generally, I think the evidence would not justify our disturbing it.

Judgment affirmed.

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SUPREME COURT.

JOHN BENNETT agt. THE CITY OF BROOKLYN.

An order made by the city court, Brooklyn, granting a new trial, is appealable.

Dutchess General Term, May, 1860.

LOTT, EMOTT and BROWN, Justices.

THIS is an appeal from an order made at the special term, dismissing an appeal from an order of the city court of Brooklyn, granting a new trial upon terms, on the ground of newly discovered evidence. The judge, at special term, held that such an order was not appealable.

MR. BIRDSALL, for plaintiff.

MR. McCUE, for defendant.

By the court—EMOTT, Justice. We think this decision was erroneous. We have held, in *Moore agt. Wood*, decided at the present term, distinctly and after argument, that an

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appeal will lie to this court, from an order made by the city court of Brooklyn, before a judgment in the action, when such an order is in its nature appealable, that is where it involves the merits and necessarily affects the judgment. We also held that this latter phrase is to be read as meaning which will necessarily affect the judgment, and referring to future as well as existing judgments.

An order granting a new trial obviously involves the merits, and we constantly entertain appeals from such orders, made for various reasons. The application in the city court in the present case was, it is true, addressed to the discretion of the court; but to a legal discretion limited and controlled by legal rules, and which is therefore open to review and examination by those rules upon an appeal. We have heretofore entertained appeals from such orders as well from the city court as in this court, and in *Thomas agt. Monas*, decided in May, 1858, we entertained such an appeal against a similar objection based upon the character of the order, and reversed an order granting a new trial on account of newly discovered evidence, because that evidence appeared to have been merely cumulative.

The order dismissing this appeal must be reversed, with \$10 costs.

Crosby agt. The New York Mutual Ins. Co.

NEW YORK SUPERIOR COURT.

SETH CROSBY, FERDINAND A. CROCKER, and GEORGE LOVELL,
respondents, agt. **THE NEW YORK MUTUAL INSURANCE**
COMPANY, appellants.

CHARLES C. DUNCAN and others, respondents, agt. THE
GREAT WESTERN INSURANCE COMPANY, appellants.

Where a vessel under a marine policy of insurance receives a fatal injury while owned by the insured, he will be entitled to recover to the extent of the injury, though he sells her subsequently, and before the destruction is visibly complete. Where it appears that neither the assured, nor the underwriters, could exercise any control over the vessel; and that in the course of the voyage the vessel had been placed in such a position that it was totally out of the power of the assured or the underwriters to procure its arrival, the voyage being arrested, and the vessel receiving a damage which, considering its nature, rendered it certain that it could not reach its original destination, the *loss is absolute, and of itself total*, independently of the election of the assured to treat as such.

It is only in case of a constructive, not of an absolute total loss, that an abandonment is necessary.

General Term, December, 1859.

BOSWORTH, WOODRUFF and MONCRIEF, Justices.

This action was tried before Mr. Justice PIERAZZONI and a jury, verdict being rendered in favor of the plaintiffs, and judgment thereon being entered, the defendants appealed to the general term.

The action is for a total loss on a marine policy of insurance for \$10,000 upon the ship Adriana, dated the 21st day of March, 1856, to take effect from the date thereof, and to continue till the voyage was ended, and the vessel moored in safety for twenty-four hours. The ship became a total loss during the voyage.

The interest of the plaintiffs in the policy (to whom it was made payable,) is limited to the sum of \$4,161.50 with interest from March 19, 1856, that being the amount due to them from the owners of a bill of stores and chandlery furnished the ship for the voyage on which she was lost.

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They claim otherwise as trustees of the owners, among whom as they allege are William D. Crocker, David Crocker and Theodore Ripley.

The defendants stated at the trial, when the case was opened on behalf of the plaintiffs, "that they now admitted their liability for three-fourths of the loss and only defended as to the one-fourth, and that they defended as to this one-fourth solely on the ground of the change of interest as to this one-fourth after the inception of the policy and before the loss."

By bills of sale bearing date respectively on the 17th, 18th, and 21st days of April, 1856, all of which were executed by delivery on the 24th day of the same month, Wm. D. Crocker, David Crocker and Theodore Ripley, the owners of the said one-fourth part of the vessel insured, conveyed that portion to Kendall and Richardson and received pay for the same.

By stipulation between the parties, three-fourths of the amount of the verdict (for the whole claim) was paid, and the question before the court affects only the remaining, so sold, one-fourth.

On the 13th day of April, 1856, the vessel sailed from New York for California, and was sunk at sea on the 5th or 6th day of May following.

Wm. M. EVARTS and R. S. EMMET, *for appellants.*
DEXTER A. HAWKINS, *for respondents.*

By the court—MANSFIELD, Justice. The words in the policy "for whom it may concern" must be applied to the interest of the parties, and only the parties for whom it was intended by the person who effects or orders the insurance. (7 *Har. and John. Rep.*, 417; 4 *Wend. R.*, 75; 8 *Wend. R.*, 144; 24 *Wend. R.*, 276; 2 *Caine's R.*, 203.)

Those terms are always controlled by proof of the par-

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ties for whose benefit the insurance was in fact intended. (*Sharp agt. Whipple*, 1 *Bosworth's R.*, 567.)

Proof was given, showing that William D. Crocker, David Crocker and Theodore Ripley, were the owners of the one-fourth interest in said vessel up to the 24th day of April, 1856, on which day bills of sale therefor (of previous dates) were delivered to Kendell and Richardson, the purchasers.

On opening of the case on behalf of the plaintiffs, the defendants stated that they defended as to this one-fourth solely on the ground of change of interest as to this one-fourth after the inception of the policy, and before loss.

The jury, upon the evidence of the case, found as a matter of fact that the vessel, "before the 24th day of April, received the fatal injury which caused her subsequent loss, by sinking, on the 5th or 6th day of May following."

The vessel having received a death wound before she was sold, then it is true by the perils insured against, she was damaged while owned by the insured, and they should recover to the extent of that damage, though they sell her subsequently, and before the destruction is visibly complete.

The question then arises, what, on such a state of facts, was the extent of the damage or the loss? Wherever it appears that neither the assured, nor the underwriters, could exercise any control over the vessel; and that in the course of the voyage the vessel had been placed in such a position that it was totally out of the power of the assured or the underwriters to procure its arrival, the voyage being arrested, and the vessel receiving a damage which, considering its nature, rendered it certain that it could not reach its original destination, the loss is absolute and of itself total, independently of the election of the assured to treat it as such.

The loss is, in its nature, total to him who has no means

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of recovering his property, whether his inability arises from its annihilation, or from any other insuperable obstacle. It is only in case of a constructive, not of an absolute total loss that an abandonment is necessary. (1 *Curtis R.*, 152; 9 *Barn. & Cres. R.*, 411; 2 *Maule & Selw. R.*, 240; *Burk. R.*, 169; 3 *Bing. N. C. R.*, 266; 14 *Conn. R.*, 50.)

If the damage was such that the vessel could not get into port, but sunk at sea, the loss was practically total, and in substance and good sense amounted to the sum insured, and the defendants are bound by the very terms of their contracts to pay the whole sum insured. (3 *Johns. Cases*, 16; 3 *Bing. N. C. R.*, 286; 6 *Mass. R.*, 465; 7 *Ohio R.*, 283.)

No cases say that the bare existence of the hulk, "the mere congeries of plank and iron" of the ship prevent the loss from being total.

The exceptions, therefore, not being well taken, the judgment will be affirmed in conformity to the stipulations between the parties.

Judgment, therefore, will be entered for the plaintiffs in conformity to the stipulation between the parties.

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UNITED STATES CIRCUIT COURT.

PATRICK BRADY agt. THE STEAMBOAT NEW PHILADELPHIA.

On exceptions, in a case of collision, the amount allowed a barge for *demurrage*, while undergoing repairs, was *held* erroneous, where it appeared by the proofs that fifteen days elapsed after the barge was raised, and the owner had notice of the fact before he began to discharge her of her cargo. The fifteen days estimated service was not chargeable to the respondent. Also a *pro rata* abatement for *wharfage*. A charge of \$60, for clothes of the master lost in the vessel, *held* not chargeable to the respondent.

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New York, October, 1859.

This is a motion to set aside the report of the commissioner on an assessment of damages in a cause of collision.

MOTT & MURRAY, for the exceptions.

BURRILL, DAVISON & BURRILL, in opposition.

NELSON, C. J. Among other exceptions, one is to the amount allowed the vessel for demurrage while undergoing repairs, because (1) the value of the use of the vessel, or what she could have been hired for on account of the demand for vessels of this class, as allowed, is too high upon the proofs in the case, and (2) the time for which the allowance was made is not warranted by the evidence.

In respect to the first ground, we are of the opinion that the evidence supports the allowance according to the principles governing this question, as laid down in the case of *Williamson agt. Barrett*, (13 How., 106.)

Upon the second ground we think the commissioner erred, as it was in proof that some fifteen days elapsed after the barge was raised, and the owner had notice of the fact before he began to discharge her of the coal, and we see no explanation or contradiction of this evidence. There was allowed for the use of the vessel \$12 per day. There must be a deduction, therefore, from this item of \$180.

There is also an exception to the allowance for the wages of the master of the barge, and for clothing lost in the vessel. His wages were \$35 per month, and \$12 per month for board. The aggregate, with some other expenses, is put at \$175, and \$60 for his clothes lost. This last item must be stricken out, as not an item belonging to the libelant, and a deduction must be made for the fifteen days' service not chargeable to the respondent. Also a *pro rata* abatement for wharfage. The counsel can agree on this.

The remaining exceptions we think are not well founded.

In the Matter of petition of Daniel Buhler.

SUPREME COURT.

IN THE MATTER OF THE PETITION OF DANIEL BUHLER, TO VACATE ASSESSMENT FOR PAVING THE NEW BOWERY, &c.

"If in the proceedings relative to any assessment or assessments for local improvements in the city of New York, or in the proceedings to collect the same, any fraud or legal irregularity shall be alleged to have been committed, the party aggrieved thereby may apply to a judge of the supreme court, in special term or in vacation, who shall thereupon, upon due notice to the counsel of the corporation of the city in which the lands so assessed are situated, proceed forthwith to hear the proofs and allegations of the parties." (*Laws of 1858, ch. 338, § 1, p. 574.*)

Held, that the intent of the act is to confine it to proceedings by which the assessment was *immediately ordered*; that is, to limit it to the resolution and providing for doing the work to be paid for by the assessment, the laying of the assessment, and the proceedings to collect the same —

Consequently the act does not apply to assessments regularly made for paving a street, where a mere irregularity is alleged in the change in the *grade of the street*, by reason of which such paving became necessary; although, it seems, it would be otherwise, if it was alleged that the proceeding for the change of grade was void for want of jurisdiction.

The changing of the grade of a street is not necessarily a proceeding relative to the assessment for paving, and after the change of grade has been made without objection, it is too late to allege the whole proceeding to be irregular.

New York Special Term, November, 1859.

INGRAHAM, Justice. Proceedings in this matter were commenced before me some time since, and the evidence taken therein shows that after the opening of the street the common council ordered the grades to be changed, that in consequence thereof the grades of the adjoining streets had to be altered to correspond therewith, and the assessment here complained of was for this work. The ground upon which the petitioner rests this application is that the ordinance to change the grades was passed in violation of the provisions of the act of 1852, which prohibited any change of the grades of streets without the consent of two-thirds of the owners of the land fronting thereon.

No fraud or irregularity is alleged to have been committed either in passing the ordinance for the assessment

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or in the proceedings to collect the same, and this question is now submitted to me, viz: Whether the want of the written consent of two-thirds of the owners of property to change the grade of the streets is a sufficient cause within the provisions of the act in relation to frauds in assessments for local improvements in New York, passed in 1858, (*Laws of N. Y.*, p. 574,) to vacate the assessment for paving the streets after such grade was adopted?

The words of the statute are as follows:

"If, in the proceeding relative to any assessment or assessments for local improvements in the city of New York, or in the proceedings to collect the same, any fraud or legal irregularity shall be alleged to have been committed, the party aggrieved may apply," &c.

The statute applies to two cases:

1. Where the fraud or irregularity is committed in the proceedings relative to the assessment.
2. Where the fraud or irregularity is committed in the proceedings to collect the assessment.

No fraud or irregularity is charged as to the second ground, the collection of the assessment. The decision of this question, therefore, depends on the construction given to the term, "the proceedings relative to the assessment."

This has heretofore been construed as applying to the laying of the assessment, the passage of the ordinance therefor, and the resolution directing the work to be done for which the assessment was laid. In all such cases, where fraud or irregularity has been shown, we have in several instances vacated such assessments.

The proceeding now objected to does not come within either of these cases. The petitioner contends that although it is not within these cases, still that the work would not have been required if the law of 1852 had been complied with in regard to the change of the grades, and that it was therefore irregular to order the pavement to be relaid.

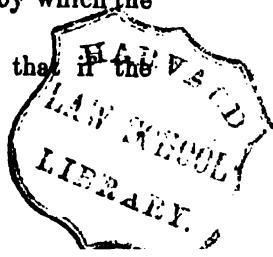
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I am of the opinion that the act will not bear such a construction. Although the statute may be considered a remedial one, and is beneficial in its operation in giving the owners of property relief against illegal assessments, which before its passage could only be obtained through the tedious and hazardous process of submitting to a sale for the assessment, and the contesting its legality in an action to recover the possession after such sale had been confirmed, still it is not to be extended by inference beyond the fair interpretation of the words used in defining the cases in which the law may be resorted to.

The proceedings relative to an assessment cannot by any fair interpretation be extended beyond the initiatory proceedings to order the doing of the work for which the assessment is to be made. The changing of the grade in the New Bowery and adjacents streets was not necessarily a proceeding relative to the assessment for paving. No objection appears to have been made thereto. If any party objected to it, ample remedies existed by which such change could have been prevented long before any measures were taken to order the work to be done for which such assessment was to be laid. The case suggested by the counsel on the argument, of irregularity in the opening or widening of a street, shows more forcibly the impropriety of connecting the original improvement with the subsequent ordinances for grading or paving it. The opening has nothing to do with the proceedings to regulate or grade, and yet the irregularity in opening would be as good a ground for setting aside an assessment for paving, as the irregularity in the change of the grade would be sufficient to vacate an assessment for paving after such grade had been changed.

The title of the act shows the intent of the legislature to have been to confine it to the proceedings by which the assessment was immediately ordered.

It was urged on behalf of the petitioner that, if the



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original change of grade was void, the subsequent proceedings to pave the streets according to it was illegal, and therefore came within the provisions of the statute. I am at a loss to see on what ground the change of grades can be declared void. The common council had authority to make such change, but were directed before doing so to have the written consent of a portion of the owners. If they acted without consent, they might have been restrained from carrying out such change, or perhaps those who were injured might have an action for damages therefor; but after they have permitted such change to be made and completed without objection, it is too late to allege the whole proceeding to be irregular. If they can resort to such an irregularity in the original proceeding for changing the grade to relieve them from the expense of paving, the objection will continue through all time, whenever it shall become necessary to repair the sidewalks, or curb, or do any work on the street which could be the subject of an assessment. Such never could have been the intent of the statute.

The proper construction of it must be limited to the resolution and providing for doing the work to be paid for by the assessment, the laying of the assessment, and the proceedings to collect the same, and cannot be extended to previous matters which did not render an assessment necessary and were not immediately connected therewith.

If the common council should pass a law or order an improvement for which they had no authority, and the whole proceeding was absolutely void and without jurisdiction, all subsequent legislation founded on such void act, must also be irregular and void. In such a case I suppose this act may be resorted to for relief against any assessment so imposed, on the ground of irregularity in ordering the work to be done; but a mere irregularity in such previous proceeding cannot be resorted to, when the subsequent proceedings are without any other objection.

Blake agt. James.

If the petitioner desires to be heard on the question, whether the resolution to change the grade is absolutely void, he can give a notice therefor. If not so noticed, the application is denied.

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SUPREME COURT.

ANSON BLAKE agt. **SARAH F. JAMES** and **EDWARD D. JAMES**.

In an action commenced in a justice's court, and a plea of title interposed by the defendant, upon which the action is discontinued, and an action for the same cause commenced in this court, and the plaintiff succeeds upon one cause of action only, and that recovery is less than \$50, and fails as to the others, upon which the defendant succeeds, the plaintiff must still be allowed costs (*Code*, § 61,) where there is no certificate of the court that *title to real property* came in question on the trial.

Kings Special Term, March, 1860.

MOTION on the part of the defendants for allowance of costs to them, and for disallowance of costs to the plaintiff, &c.

LOTT, Justice. It appears by the judgment roll in this action that the action was originally commenced in one of the district courts of the city of New York, where the plea of title was interposed, and thereupon, upon the compliance by the defendants with the requirements of law, the action was discontinued, and commenced in the supreme court. The plaintiff succeeded on one cause of action against the defendant, Edward D. James, and failed against him as to the other, and failed entirely as against the defendant, Sarah F. James. The recovery on the cause of action as to which the plaintiff succeeded was less than fifty dollars. Judgment was entered by the clerk in favor of the plaintiff, for his costs against the defendant Edward D. James, and he declined to allow costs to the defendant Sarah F. James.

Palmer agt. Moeller.

In this, he acted correctly. The rule as to costs in such cases is prescribed by § 61 of the Code, and not by the general provisions of law applicable to costs. It is by that section, expressly provided that "if judgment in the supreme court be for the plaintiff, he shall recover costs, and if it be for the defendant, he shall recover costs, except that upon a verdict he shall pay costs to the plaintiff, unless the judge certify that the title to real property came in question on the trial." In this case there was a verdict, and no such certificate was given by the judge. The clerk therefore was authorized to allow costs to the plaintiff, not only against the defendant Edward D. James, but against the other defendant also. (*See Howard's Code, §§ 55 to 61, and § 68.*) There is consequently no ground of complaint, and the adjustment of costs, as made by the clerk, is sustained, and the defendant's motion is denied, with \$10 costs.

NEW YORK COMMON PLEAS.

PALMER agt. MOELLER.

Where an action is commenced in the New York district (Justices') courts by a *non-resident* plaintiff, by *long summons, without security*, it is an error for which this court on appeal will *reverse* the judgment.

And the decision of this court upon the question will not be allowed to be carried to the court of appeals, where the same question is pending in the latter court.

New York General Term, June, 1859.

DALY, BRADY and HILTON, Judges.

By the court—HILTON, Judge. This action was commenced by a non-resident plaintiff, by long summons and without giving the security required by the act relative to the district courts, passed in April, 1857. At the trial, upon these facts appearing, the defendant asked that the action be dismissed, (*see act, § 45.*) which the justice

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refused. We hold this to be error, and therefore reverse the judgment.

The respondent now asks for leave to go to the court of appeals, that he may have our decision upon this question reviewed.

We have already permitted a case, involving this precise point, to be taken to that court, and as the question is mainly one of practice in justices' courts, under the provisions of the act referred to, not involving the merits of an action, and in that point of view cannot be said to assert any substantial right of a party, we do not feel disposed to multiply cases on the subject in the court of appeals. For this reason the application is refused.

Motion denied.

SUPREME COURT.

IN THE MATTER OF THE APPLICATION OF LEVERETT S. DAVIS.

A party in possession of an office, with claim or color of title, should have the custody of the books and papers, and a party out of possession and not in a condition to exercise its functions, and who makes no attempt to perform its duties, should not have these incidents and appurtenances to the office until there has been a trial of the title in the mode provided by law, (by quo warranto,) and his right has been there established.

This principle applied to the present case, which was an application under the statute, by a party appointed supervisor by the justices of the town to fill a vacancy occasioned by a party previously elected who omitted to take the oath of office within fifteen days, to compel the delivery to him of the books and papers of the office, held and claimed by the former supervisor who held possession.

At Chambers, Utica, July 6, 1860.

APPLICATION to compel the delivery to the applicant, of books and papers belonging to the supervisor of the town of Florence, Oneida county, N. Y.

N. C. WHITE, *for applicant.*

M. H. THROOP, *opposed.*

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BACON, Justice. This is an application made under the provisions of the statute, to compel the delivery of books and papers claimed by the applicant to belong to him by virtue of his alleged incumbency of the office of supervisor of the town of Florence. The substance of the statutory provision on this subject is, that whenever the term of office of any supervisor shall expire, and another person shall be elected or appointed, it shall be the duty of the latter to demand of the former the records, books and papers belonging to the office. In case of a refusal to deliver upon such demand, complaint may be made to a justice of the supreme court, who shall thereupon grant an order to show cause, and such further proceedings are to be had in the matter as the statute provides. (*See 1 R. S., original paging, 358, § 9, &c. 125, § 55, &c.*)

The affidavits presented to me on the part of the applicant set forth in substance, that in March, 1859, Aaron H. Thomson was elected supervisor of the town of Florence, who (it is admitted) duly qualified and assumed the duties of the office, and has hitherto discharged them—that at the annual town meeting in March, 1860, Lewis Rider was duly elected supervisor of the town, but he did not within the period prescribed by law take the oath of office, whereby the office became vacant—that the town neglected to fill the vacancy within the period of fifteen days after the happening of the same, and thereupon and after due notice to the justices of the peace of the town, all of them met, and three of them appointed Leverett S. Davis supervisor of the town, (one of the three who signed the certificate of appointment being Davis himself,) and that immediately thereupon he took the oath of office, and has demanded the books and papers, which Thomson has hitherto neglected and declined to deliver.

On the part of the contestant, Thomson, a mass of affidavits has been presented, the purport of which is to show that the town clerk of Florence improperly and wilfully

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neglected his duty, by failing to give notice of a meeting of the electors of the town to fill the vacancy, if in truth any existed, denying that a legal election was made by the justices of the town, and setting forth by what right the said Thomson still claims to be the incumbent of the office, and what duties he still performs therein. Much of the argument before me on the return of the order to show cause, was occupied in maintaining the several titles of the applicant and the contestant to the office; but in the view I take of this matter, and the ground upon which I place the decision of this application, it will not be necessary for me to enter into the discussion of that question. My impression is that on the mere question of the legal title to the office, I should find no great difficulty in maintaining the claim of the applicant, if the inquiry was limited to that question. I do not intend, however, to decide that issue, nor even to intimate any opinion further than to say that the affidavits in opposition to this application contest the title to the office and raise a serious doubt upon that question.

The most important question upon this motion, and the one on which its decision must turn, is, who is in the *actual possession* of the office, retaining the muniments and exercising the functions pertaining thereto. The statute under which this proceeding is instituted, it seems to me very clearly was never intended to apply to a case where there is a real question of title to the office, and no possession to any practical purpose has been obtained. In such a case ample provision is made by a proceeding in the nature of a *quo warranto*, to try the title to the office. (See *Code*, § 432, *et seq.*)

The allegation, and the only one in the affidavit of the applicant upon this point, is that he was duly appointed to the office of supervisor, to supply the vacancy occasioned by the refusal of Lewis Rider to serve, and on the 12th of April, 1860, took and subscribed the constitutional

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oath, and filed the same in the office of the town clerk. This is the only act he has performed, and this was necessary to enable him to prosecute a claim for the office in any form. He has none of the insignia or muniments of the office, and has discharged no duty pertaining to it. On the other hand, the affidavit of Thomson sets forth that he is in the actual possession of the office, claiming to be the rightful supervisor of the town, that since his election, and since the commencement of this proceeding, he has remained in possession of the office, and has discharged all its duties, by receiving and paying out school and library moneys, superintending the making out of the jury list, and appointing trustees to fill vacancies in school districts, and that he holds the books, papers, moneys, and all other incidents of the office, and is in possession thereof in all respects, to the exclusion of Davis, and of all other persons. He claims to hold the office by virtue of the statute which continues the actual incumbent in the office until the vacancy which is claimed to exist is filled pursuant to law.

Such appearing to be the facts, it is very clear upon the authorities, and a proper apprehension of the object and scope of the statute, that no order can be made on this application for the delivery of the books and papers sought to be obtained in this case. In the *People agt. Stevens*, (6 Hill, 616,) a *mandamus* was applied for to compel the clerk of the common council of Brooklyn to deliver the books and papers pertaining to the office. The application was denied on the ground that if the relator was in truth clerk and there was no dispute as to the title to the office, the specific remedy provided by the statute to compel a delivery of the books and papers applied to the case, but Bronson, J., in his decision, expressly held that while the title to the office was in dispute, the only mode of trying it was by information in the nature of a *quo warranto*. After this decision had been made, an application was

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made to KENT, then circuit judge, under the statute to compel delivery of the books and papers. Having heard the case, he decided that it was not one falling within the summary jurisdiction conferred by the statute, and he accordingly denied the application. "It is obvious," he says, "that the legislature never intended that a judge should exercise the power to enforce the delivery of books and papers against an officer *de facto*, where the title of the applicant to the office is at all questionable." The title in that case was not clear because the judges differed in their views of the question, and the applicant was opposed by a clerk *de facto*, holding and exercising the office under *claim and color* of right, and either of these, it cannot be doubted, is sufficient to put the party claiming delivery of the incidents of the office to the trial of his title by a suit at law.

In the case of *Benjamin Welch*, (14 Barb., 396,) a similar application was made and denied. Cook was the actual incumbent of the office of treasurer of the state, claiming to hold by virtue of the certificate of the state canvassers; but Welch, upon an information and trial of the right, had obtained a verdict in his favor affirming his election. Judge WATSON held that no such proceeding could be taken until an actual judgment of *ouster* had been entered against the person executing the duties of the office, thus assuming the principle that as against one in possession and claiming an office, the statute providing for delivery of books, &c., has no application until the party asking the aid of the judge has had a trial of his title, and a judgment has been actually entered in his favor.

The principle to be extracted from these cases was maintained and applied in the case of *Conover agt. Devlin*, (24 Barb., 587,) where the application was granted, simply on the grounds that the applicant was in possession of the office under color and claim of title. The judge further held in that case that upon such an application the court

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could not entertain the question of title to the office, and that if there was reasonable doubt as to who was entitled to it, that question must be determined on a direct proceeding for the purpose, by action in the nature of a *quo warranto*. It is expressly held in this case that where an office becomes vacant, and an individual, with claim of title *enters and assumes the duties thereof*, he is to be considered the officer *de facto*, and in possession of the office.

In his opinion, Judge PEABODY maintains that the question of title should not be tried in this proceeding—that wherever a person is in the office exercising its functions, he should be entitled to take this proceeding to obtain the books and papers, “and, on the other hand, that having the best possible right to an office, one should not have possession of the books and papers by this proceeding, while it is apparent *he is not in the occupancy of the office*, and not in a condition to exercise the functions of it.”

I concur in this view, and I deem it a just exposition of the statute. A party in possession of an office, with claim or color of title, should have the custody of the books and papers, and a party out of possession and not in a condition to exercise its functions, and who makes no attempt to perform its duties, should not have these incidents and appurtenances to the office until there has been a trial of the title in the mode provided by law, and his right has been there established. The statute is only applicable, as the case in *Hill* substantially holds, where the title is clear, and where the party against whom the proceeding is taken is not in possession under color of a legal right to hold the office. It follows that this application must be denied, but of course without prejudice to any other remedy the party may be advised or see fit to pursue, for the establishment and enforcement of what he claims to be his right.

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SUPREME COURT.

IN THE MATTER OF THE PETITION OF WILLIAM HOLMES, FOR THE CUSTODY OF HIS CHILDREN.

Where *spiritualism* with its usual tendency to *free love* on the part of the husband works its legitimate results, in the separation of his wife from him, she will be awarded the custody and care of the younger children, and the older children put to a boarding school (where the husband's means are sufficient) at the husband's expense; (without any particular modification of the general sentiment, that he is a *public fool*.)

SIDNEY S. HARRIS, *counsel for petitioner.*

H. W. ROBINSON and J. W. GREEN, *for defendant.*

LEONARD, Justice. William Holmes applies by petition invoking the equitable powers of this court to obtain the custody of his children, Anna and Ivah, now in the care of their mother, at Brooklyn. The petition has been served upon the mother, with an order from the court requiring her to show cause why the prayer of the petition should not be granted; and she stands, therefore, as a defendant in this proceeding, claiming to retain the custody of her daughters. William Holmes and Charlotte Louisa Schoolcraft—whom I shall call the defendant—were married at Troy, in this state, in 1841, and the relation of husband and wife still exists between them. There are three children of the marriage, all of whom are daughters. The eldest, Anna, aged about seventeen, resides with her mother, as the result of her own choice. The second, Carrie, aged between fourteen and fifteen years, in the exercise of her choice or judgment, resides with her father, the petitioner. The third, Ivah, aged between seven and eight years, resides with her mother, the custody of this child having been awarded to the defendant, in October last, by the direction of the judge of the supreme court, at Chicago, in Illinois, under a proceeding in relation to

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the custody of these children by *habeas corpus*, instituted in that court by the defendant, to obtain the custody of all the children from the father. The petitioner resided with his wife at Troy, during the summer of 1859, and they had previously resided in this state during the principal part of their married life. In August of that year, the petitioner, without apprising his wife of his intention, and without any provision for her support, left her and removed with his children to Chicago, and has since resided there and elsewhere in the western states. He brings no charges against his wife to justify his desertion of her, or to exclude her from participating in the nurture of her children, except that she is, as he alleges, of an irritable and jealous disposition, and has become infected with spiritualism. Her denial of this latter charge appears, however, to be fully corroborated by the evidence of her friends, and her acts and faith have never, I think, extended further than the approval of her husband, and his own wishes at the time and perhaps her own curiosity as to the rapping manifestations might justify. Mrs. Holmes, on her part, also charges that her husband is possessed with the delusion of spiritualism, including a tendency to accept the free love part of the faith. The whole of this charge is repelled by him vehemently. Whatever may be his present views upon that subject, he did undoubtedly take part as an associate with a company who were engaged in lecturing and exhibiting the wonderful manifestations of spiritualism in public, traveling from place to place, for some time including a female medium in the company, in regard to whom several passages in a letter of the petitioner, which have come to the hands of Mrs. Holmes, and have been produced in this proceeding, justify some irritability and jealousy on the part of a wife. Preliminary to the commencement of this proceeding, the petitioner made overtures to the defendant to renew their marital relations, and offered to provide a home for his

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wife and children with him, if she would accept it, as comfortable as his circumstances would warrant, which overtures have been declined by her, unless he will prove by a course of conduct decided upon by her that he is really sincere in his present professions. It should also be observed that the defendant produces two letters from the petitioner, written in March, 1859, in which he describes the relations then existing between them as legal sensuality—"a crime against the higher law of their own souls;" "that their intercourse is not prompted by mutual love;" that it is "so damning, so repulsive, I hereby swear I will suffer no more for that sin." He does not want "a housekeeping, social, humdrum, common place relation for purposes of physical comfort and personal convenience, but that nuptial union which consecrates soul to soul;" thinks she will "realize that theirs was a false marriage," the final object of several pages of such delusive, foolish and wicked sentiments being to convince his wife that a separation will be the best and happiest thing for her as well as for him. The petitioner shows that his pecuniary resources are sufficient for maintaining his family in a good social station in society, and to afford to his daughters a liberal education, which is now being much neglected. The defendant, with her two daughters, Anna and Ivah, are now residing with the mother of the defendant, in Brooklyn, in comfortable though not in affluent circumstances, and the present associations and training of these children are such as are manifestly good for their moral culture and well being, and their present protectors are willing and desirous of continuing the same kindness to the defendant and her children as long as it may be necessary, although they are under no obligations to do so. Both the parents of these unfortunate children are tenderly attached to them and desire their society, and are truly and deeply interested for their welfare and happiness. I cannot, however, look upon the complaints which the

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petitioner makes against his wife, as in any degree warranting a separation from her. The grounds for his desertion of her are such undoubtedly as many endure without a murmur ever reaching the public ear, from motives of even far less magnitude than the future respectability and happiness of their children. It is the duty, too, of a faithful mother, to say nothing of the duties pertaining to a wife, to undergo much and suffer long before she submits her grievances for adjustment in a court of justice as against her husband. It cannot be overlooked in this case, however, that the conduct of the petitioner towards his wife has not been such as to entitle him to think that she would, without evidence of his repentance for his cruel desertion of her, and for his harsh and unmanly letters, and for his still more cruel treatment in deceitfully bereaving her of the society of their children, be willing to remove with him from this state, if such is his desire, or to a great distance from friends on whom she can get relief or assistance in case his offers to again provide a home for her and the children should again prove to be merely a desire for again separating her from the children now with her. These last observations are made with reference to the overtures of the petitioner to his wife for a renewal of their former relations and her reply to them. The petitioner has, however, demanded the custody of the children as his legal right as their father; without reference to or in defiance of the particular circumstances of this case. From the examination of the authorities reported in such cases in this state, I am satisfied that the welfare of the children is the first thing to be considered. Guided by that rule, the case is not free from difficulty. The feelings of the father may be alienated by a long separation from his children. Having one child who has voluntarily chosen him as her guide and protector, his affections may be centered on that one, to the exclusion of the two who are subjects of this controversy. Such result may very probably

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injurious affect their pecuniary expectations in case of a testamentary devise by the father before his death. The father may not see fit to afford them so liberal means of education and support as they would otherwise receive. In the case of a son the father would have the better means of introducing him into business upon the son's attaining manhood. But in the case before us, if the mother refuses to renew her former relations with the petitioner, I do not find a satisfactory prospect that we can afford his daughters such a home as is necessary for the proper rearing, protection and respectability, having reference to his means and their present situation. My solicitude is less in respect to Anna, who, from her age and appearance, has now reached the threshold of woman's estate, and has no doubt the discretion to make a just selection of a home, if driven to choose between her parents by their ill considered separation. In my opinion, it will be wiser for her, in view of the future, to discard all pecuniary expectations, if necessary so to do, and to choose, as she has already done, her mother as her guide, instructor and companion. Let it not be understood that I counsel Anna to treat her father with disrespect, or even to refuse or slight any kindness or advice he may offer her. On the contrary, should he desire to furnish her the advantages of further education at any female seminary in this state, within one hundred miles of Brooklyn, during the next two years, it will be her duty to comply with such reasonable direction of her father, and the duty of the court to lend its aid in enforcing compliance. The petitioner is not to be prevented from visiting his daughters, wherever they may be, at reasonable times. Ivah must be committed to the custody of her mother for rearing and education, until she reaches the age of twelve years. Should her father then desire to increase her advantages for education, he may direct her for that purpose in the same manner as is provided as to Anna. Unless the par-

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ties agree as to the seminary and boarding place for Anna and Ivah, the directions of the petitioner in these respects are to be subject to the approval of the court. Mrs. Holmes is to have the right to visit her daughters at her pleasure while they may be attending their education. Subject to these provisions, the application of the petitioner is denied.

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UNITED STATES DISTRICT COURT.

J. A. AND J. D. SECOR agt. THE STEAMBOAT HIGHLANDER.

Held by the court—1. That if it can be fairly inferred from the stipulations of the contract that the libelants meant to trust to the personal responsibility of the owner, the contract is inconsistent with the exercise of a lien, and the same is waived. (17 *How. R.*, 53.) And it would also be waived if an unconditional credit were given for the payment, extending beyond the time for which a lien is given by the state law. (7 *Peters*, 324.)

2. That the fair import of the lien law of this state is, that the material man shall have a lien for what the owner agrees to give him in payment for his work and materials, provided that which is agreed to be given is by the agreement to be given before the expiration of the time allowed by law for the lien to exist.
3. That the owner of the *Highlander* agreed to pay the libelants by a note at three months, to be given when the work was finished, and for the fulfillment of that payment the libelants had a lien. And if the note for \$1,400, at three months, had been given or tendered by the owner, the lien would have ceased, as in that case there would have been a credit extending beyond the time allowed by the state law for the existence of the lien.
4. But the note not having been given or tendered, the libelants still have a lien upon the boat, as well for the balance upon the contract, as for the extra work.
5. Wharfage not an item of lien in such a case, it is not a material furnished nor a necessary incident of the contract.
6. In order to tax witnesses' fees under the act of congress, (10 *Statutes at Large*, 167,) it must appear that they have actually been paid *so nomine* at or before trial.

THE libel in this case was filed to recover for work done, and materials furnished by the libelants to the steamboat. A contract in writing was made between the owner of the

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boat and the libelants on the 2d of February, 1855, by which the libelants agreed to build and put on board the steamboat a boiler, and do certain other work for which the owner agreed to pay \$4,400, as follows: \$1,000 on March 1, \$1,000 on April 1, \$1,000 when the boiler was put on and all the work completed, and the balance in a note payable three months from the completion of the work. The boat was to run between New York and Albany. The work was finished June 5, 1855. The three cash payments were made, but the note for \$1,400 was never given or tendered. Some extra work was done to the boat, the amount of which was disputed. And the agent of the libelants coming to receive payment of both claims, the owner offered to give a note at three months for \$2,500, in satisfaction of both. This was denied, and the libel then filed.

The respondent claimed that the libelants, by agreeing to receive a note at three months from the completion of the work, had waived the lien given them by the state law upon the boat for the \$1,400. For the rest it was admitted that he would have a lien.

D. McMAHON, *for libelant.*

E. C. BENEDICT, *for claimants.*

INGERSOLL, D. J. The demand of the libelants in this case consists of two claims; one of these claims is for work and labor done and performed on the engine of the *Highlander*, amounting in the whole to several hundred dollars. It is admitted by the respondents, that for this claim, they, the libelants, have a valid lien upon the boat, which can be enforced in admiralty, and that it must be referred to a commissioner to ascertain and report the amount that is justly due.

The other claim is contested, and it is insisted that for it there is no valid lien, and that the boat cannot be helden in admiralty for the payment of the same. It consists of

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a demand claimed to be due for building and furnishing the boat with a boiler. The boiler was made by the libelants and by them furnished to the boat, in New York, she at the time belonging at the port of New York; she was therefore a domestic vessel. The contract was entered into on the 2d day of February, 1855. By it the libelants agreed to build a boiler for the steamer, according to certain plans, in good and workmanlike manner; to take off the old boiler; to put the new boiler on board; to put up one blower engine and two blowers; to put up all pipes, and make all connections, all in good order, ready for steam, for the sum of forty-four hundred dollars and the old boiler. And the owners of the boat agreed that the libelants might do the work, and that they would pay the said sum of \$4,400, in manner following: \$1,000 on the 1st of March then next following; \$1,000 on the 1st of April; \$1,000 when the boiler was put on board and all the work completed, and the balance of \$1,400 by note, at three months from the time of the completion of the work. There was no time stated in the contract when the work was to be completed. It was therefore to be done in a reasonable time. The work agreed to be performed by the libelants was finished on the sixth day of June, 1855.

The three \$1,000 dollar cash payments were made before the filing of the libel, though not punctually at the time agreed upon. The libel was filed on the 8th day of August, 1855. The note of \$1,400 was never given to the libelants, or tendered to them, though the owners of the boat resumed possession of her upon the completion of the work. The libelants now seek to enforce the payment of that \$1,400.

The laws of New York give to persons who furnish work and materials of the kind furnished by libelants to vessels like the *Highlander*, a lien upon the vessel for work and materials so furnished, which is to continue for a certain period of time after the possession has been parted

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with. But it is insisted by the respondents, that in this, that by the contract entered into the lien for this \$1,400 was impliedly waived; that a lien for this \$1,400 under the state laws is inconsistent with the contract, as the vessel was a domestic one. It is not claimed by the libelants that any lien exists except by virtue of the laws of the state. If by the stipulations of the contract it can be fairly inferred that the libelants meant to trust to the personal responsibility of the owners of the boat exclusively, for the payment of those \$1,400, as agreed, that would be considered as a waiver of the lien, without any express words to that effect. If it can be so fairly inferred, then the stipulations of the contract are inconsistent with the exercise of a lien, and the same is waived. (*Raymond et al. agt. Tyson*, 17 *Howard*, 73.) And if by the contract an unconditional credit is given for the payment of this \$1,400, extending beyond the time which the law gives to the lien, that would be considered as a waiver of it. The giving of such credit would be inconsistent with its exercise. (*Peyroux et al. agt. Howard et al.*, 7 *Peters*, 824.) But the mere fact of giving credit for work done and supplies furnished a ship, will not extinguish a maritime lien, or be considered as a waiver of it. (*The Nester*, 1 *Sumner*, 73.) Nor will the taking of a note, payable at some future day, be considered as such waiver. (*The Barque Chusan*, 2 *Story*, 465; *Sutton agt. The Albatross*, 2 *Wallace*, 327.) To make the giving of such credit a waiver of such lien, it must be extended beyond the time which the law gives to the lien.

By the laws of New York in force at the time the contract was entered into, it is provided, that whenever a debt amounting to fifty dollars shall be contracted by the owners of any vessel, on account of any work done or materials furnished to such vessel, such debt shall be a lien upon such vessel. And it is provided, among other things, that when the said vessel shall depart from the port

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at which she was when such debt was contracted, to some other port within the state, such debt shall cease to be a lien, at the expiration of twelve days after the day of such departure.

By a subsequent law of the state, enacted on the 25th day of March, the time for which such lien shall attach, after the vessel shall have departed to another port, is extended to sixty days. The fair import of the law is, that he who performs work or furnishes materials to a vessel, amounting to over fifty dollars, shall, in consideration of such work performed or materials furnished, have a maritime lien upon the vessel, for the security of that which is agreed to be given him by the owner for such work and materials; provided that which is agreed to be given, is by the agreement to be given before the expiration of the time allowed by law for the lien to exist. In looking at the terms of the contract, in connection with the laws of New York on the subject of a maritime lien, there is not sufficient evidence discovered by which it can be fairly inferred that the libelants meant in every event to trust to the personal security of the owners of the boat exclusively, for the performance of that which the owners agreed to do in reference to this \$1,400.

By the terms of the contract there was no unconditional credit given to the owners of the boat, for the payment of this \$1,400, much less was there an absolute unconditional credit given for its payment, extending beyond the time which the law gives to the lien. It was to be paid by a note when the work was finished, and before the boat could sail to another port. That was the agreement of the owners. That was a mode of payment agreed upon by the parties, and which was to be made when the work was finished; and for the fulfilment of the payment as agreed, the libelants had a lien. And if the owners of the boat neglected and refused to give a note, according to the terms of the contract, then at once a right of action existed

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in favor of the libelants, and the lien could be enforced. If the note had been given by the owners, and accepted by the libelants, then the lien would have ceased, as in that case there would have been a credit extending beyond the time which the law allows for the continuance of the lien, and such credit would be inconsistent with a lien. In such a case there would be no demand in favor of the libelants which could be enforced, until the expiration of three months. And if the contract had been in reference to this \$1,400, that it should be payable three months after the work was finished, and after the possession of the boat had been resumed by the owners, without saying anything about a note, then there would have been an absolute unconditional credit given for this sum, extending beyond the time which the law gives to the lien, which would have been inconsistent with its existence, and in such a case it would be waived.

The boiler having been finished by the libelants according to the contract, the possession of the boat was resumed by the owners on the 6th day of June, 1855, that being the day when the work was finished. It was the duty of the owners, then, to have given the note. The note never was given. It was never tendered on the 10th and 11th of July. The agent of the libelants, with both of the claims in their favor, went to one of the owners for the purpose of a settlement. The owners objected to a number of charges in the bill for the engine work, and refused to pay till they were adjusted. At a subsequent period, these items objected to having been adjusted, the agent went to the owners again, with both bills, to receive payment. The owners then offered to give a note for \$2,500, at three months, for both claims. This is all they offered to do. The agent told them that he came to settle, according to the terms of the contract. The answer of the owners was an offer of the \$2,500 for both claims. This was declined, and the libel was soon thereafter filed. There

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was not only a neglect on the part of the owners to give a note according to the terms of the contract, but a refusal so to do.

The respondents further insist, if there was a lien on the boiler contract, that the suit has been prematurely brought. The complaint in the libel is, that the owners of the boat had neglected and refused to pay this \$1,400, according to the terms of the contract. The terms of the contract were, that it should be paid by a note, at three months from the time the work was finished. This the owners neglected and refused to do. There was therefore a breach of the contract before the libel was filed.

The decree of the court, therefore, is, that the libelants do recover not only what is justly due them for the engine work, but also the balance due on the boiler contract, and that it be referred to a commissioner to ascertain and report the amount justly due.

The commissioner, to whom was referred the assessment of the damages reported due to the libelants \$2,888.95.

The demand consisted of two parts, 1st, work per contract \$1,410, balance due on contract, and \$1,521⁸⁸₁₀₀ for extras. The claimants excepted to the report of the commissioner, and claimed deductions as follows, viz: \$411.66 as being overcharges and as belonging to the contract.

The exceptions were argued before his Honor S. R. BETTS, D. J., by Mr. McMAHON, *for libelant*, and Mr. C. L. BENEDICT, *for claimants*.

BETTS, D. J. I think the report must stand with these corrections:

1. Demand of wharfage not being demanded in the libel cannot be recovered. It is not a material furnished, nor a necessary incident of the contract. It does not appear affirmatively that it was deducted by the commissioner, and must be so now.

2. The deductions claimed because of erroneous weight of materials, because of the charges being made in the

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extra and when they properly belonged to the contract account, and other items exceeding by \$214.33 the amount of deductions made by the commissioner, are not supported by adequate proof to justify their allowance now against the report. Several witnesses give estimates upon the subject. Whatever may be their ability and experience they are opposed by the opinions of other witnesses not less entitled to credit. On such differences of opinion merely I shall not disturb the conclusion of the commissioner, drawn from a personal hearing of the witnesses. The general estimate of one witness, that the extra work and materials could all be supplied for \$1,000, cannot prevail against the testimony of the witnesses who speak to the actual labor performed, and cost or value of materials furnished.

Positive accuracy and certainty cannot be hoped for in adjusting an account of many hundred items; and from the best examination I have been able to make of the exceptions, in the light of the proofs on paper; I am not convinced that any other error than that in relation to wharfage has been proved by the claimants. I shall accordingly order the report confirmed with a deduction of \$31.25 for wharfage.

On entering final judgment, a question arose on taxation of witnesses' fees, under this state of facts, viz:

Most of the witnesses examined by the libelants before the court, and on the reference, were mechanics in the employ of the libelants, who paid them their daily wages, and afterwards, on taxation sought to include in the costs the fees of their attendance, they consuming the greater part of their day in attendance on the court. The clerk allowed for such attendance, from which the claimants appealed to the district judge, Berrs, who, after argument, decided as follows, viz:

Per Curiam : Berrs, D. J. The libelants had a taxation of fees to witnesses made in their bill of costs in this

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cause, amounting to \$110⁵⁰₁₀₀. The claimant of the steam-boat appeals from the taxation upon two grounds of exception thereto—

1. That the witnesses were not all called and sworn in court on the hearing of the cause.
2. That there is no proof furnished that the libelants have paid the fees charged, and that they cannot be taxed on any other authority than that of disbursements actually made.

The right to demand fees for witnesses attending for parties on the trial of causes in court, is derived wholly from statutory authority. The provision must be enforced according to its fair intendment. It is not to be restricted with a view to reduce or curtail the costs of suit, nor enlarged in order to secure a liberal or even reasonable compensation for his charges to the party to whom costs are granted.

The act of congress of February 26, 1853, governs the points now in question. It determines the amount of fees payable to witnesses, and the manner in which they are recoverable in favor of one litigant party against the other.

A witness cannot be compelled to attend court on a subpoena in a private action, unless his lawful fees are advanced to him. And the party who obtains judgment for costs in the cause becomes entitled to re-payment of such advances, if it be proved that the witness attended on the subpoena, and was material to the case. The witness has no remedy for his fees, except against the party who subpoenaed him—they being deemed as to all others satisfied to him when the subpoena is served, or to be matter of charge solely between the witness and the party who summoned him. When then the prevailing party seeks to recover those fees, against his adversary, the law authorizes him to claim them only as reimbursements actually made by him. “*The amount paid witness shall*

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be taxed, and be included in, and form a portion of a judgment or decree against the losing party." (10 *Statutes at Large*, § 3, 168.)

The affidavit of the libelants' proctor is, that the witnesses were in their employment on day's wages exceeding the taxable fees of witnesses, and that they continued to receive their *per diem* compensation whilst in attendance in court; and that evidence, it is supposed, is equivalent to a specific payment of fees *eo nomine*.

It is enough to say the law nowhere authorizes the substitution of an equivalent debt or equity owing to the suitor, by a witness, as payment and satisfaction of his fees by the suitor. The suitor acquires a right to judgment for the fees of witnesses subpoenaed by him only on the fact of his having actually paid the money. The taxing officer is not empowered to take an account between the witness and the party who summoned him to ascertain whether a balance on their general dealings remains payable to the witness equal to the amount of the fees claimed.

The taxation appealed from was accordingly erroneous, and must be reversed. It may be corrected by subtracting from the gross bill the items of fees to which the appeal applies, or a taxation *de novo* be had.

Appeal sustained, and taxation reversed.

From the whole decree the claimants appealed to the circuit court of the United States, where the appeal was argued by E. C. BENEDICT, *for appellant*, and D. McMAHON, *for appellee*. Judge NELSON affirmed the judgment, delivering the following opinion, viz :

NELSON, C. J. The libel was filed in this case to recover the balance due on a special contract to build a boiler for the *Highlander*, the balance being \$1,400 and interest, and also for work done over and beyond the contract amounting to some \$1,488.95. A decree was rendered in the court below for both sums. The latter account is not seriously in dispute. The balance on the contract is con-

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tested on the ground that the credit was given to Cornell, the owner, and not to the vessel. This contract was entered into between the parties on the 2d February, 1855, by which Cornell agreed to pay for the boiler, \$1,000 on the 1st of March, \$1,000 by the 1st April, \$1,000 when the boiler was on board and complete, and the balance by note at three months from the time of completion. Cornell neglected or refused to give the note as agreed, and this item has therefore been included in the suit for the other portion of the work. There is no question but that the balance of the price for the boiler is due and payable, but it is insisted that the builders had no lien on the vessel, as the credit was given to the owner. The *Highlander* is a domestic vessel, and the lien therefore depends upon the state law. This law, at the date of the contract, provided that the lien shall cease twelve days after the vessel has left the port for some other one within the state. (2 R. S., 733, §§ 1, 2.) By a subsequent law, passed March 25, 1855, the time is extended to sixty days. (*Session Laws*, 174, §§ 1, 2.)

So far as the question here is concerned, the latter law is not important. The contract was made before its enactment, and of course with reference to the old law.

On the part of Cornell, it is insisted that the agreement to take a note for the last instalment at three months was inconsistent with the idea of a lien on the vessel, as the event would occur, to wit: leaving her port in all human probability more than twelve days before the credit of three months would expire, and hence no lien could have been in the contemplation of the parties as to this payment.

On the part of the libelants, it is claimed that the whole of the contract price became due on the completion of the work; but that the last instalment was to be paid by a note at three months. And as the note was not given or tendered, this instalment became immediately due. The

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question is a close one, and I have entertained some doubts about it. Judge INGRASOLL, who decided the case below, came to the conclusion that the lien existed, and enforced it by his decree. The mere giving of credit does not necessarily displace the lien. That has been held in several cases. The ground here is not that a credit was given, but that the credit is inconsistent with the idea of a lien, for the reason unless the boat should remain at her port for the three months the lien would be lost by the terms of the statute; and that this must have been within the contemplation of the parties. The case of *Peyroux agt. Howard*, (7 Peters, 344,) bears somewhat on this question. Here a contract giving an unconditional credit extending beyond the time which the law gives to the lien was considered as inconsistent with the idea of a lien, and operated as a waiver of it. The difference between that case and the present one is the credit given here is not absolute as in the above case, but conditional—that is, upon the owner's giving a note at three months; on neglecting or refusing to give which the credit ceased, for the demand then became immediately due and payable, according to a well settled law.

Now, it may be going too far to say that the builder must have intended to waive the lien upon the event of the refusal to give the note, for the case comes down to that. I agree that he did, if the agreement was kept on the part of Cornell, and the note given. But on his refusal to keep the agreement in respect to this instalment, there is certainly much justice in saying that the builder also should not be bound by it, but should be remitted to his rights independent of the contract. It may have been material to him whether this balance should remain in account, or in a note upon which funds could be raised.

The state act is very strong and positive. It declares that such debt (one like the libelants') "shall be a lien

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upon such ship or vessel, &c., and shall be preferred to all other liens thereon except mariners' wages." There is no condition or qualification attached, as in cases of maritime liens under the admiralty, except that the work shall be done on the vessel, or supplies furnished. The affirmative, therefore, lies on the claimant to displace the lien. That it is insisted has been done, by showing a contract inconsistent with any such lien; but this assumes that the contract has been fulfilled, in which case the inference is clear; but is the party equally subject to this inference when it has been broken? It seems to me not. As I read the contract, the builder agrees to give three months' credit, on the owner's giving a note of that tenor; if not, then no credit was given. This is certainly the legal effect in case of the refusal, and I do not see why it should not be considered as the meaning and intent of the parties.

Upon the whole, I am inclined to agree with the court below, and affirm the decree.

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NEW YORK SUPERIOR COURT.

STEPHEN H. BOWLES agt. ABNER VAN HOME.

The fact of the ability of the defendant to notice the cause for trial, and put it on the calendar, does not preclude him from making a motion to dismiss the complaint for unreasonable neglect to proceed with the cause. And where the defendant noticed the cause for three terms, *held*, no answer to such a motion. Where, looking at the course of the plaintiff's attorney in the most favorable light, it was just possible to hold that his neglect to proceed with the cause had not been unreasonable, he was not allowed to try the cause, except upon payment of costs—the whole costs accrued.

New York Special Term, August, 1860.

THIS is a motion to dismiss a complaint for unreasonable neglect to proceed with the cause.

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HOFFMAN, Justice. In *Roy agt. Thompson*, (1 Duer, 636, November, 1852,) Mr. Justice BOSWORTH, with the concurrence of all the justices, stated the rule to be, that to entitle a defendant to move a dismissal of the complaint, he was not bound himself to notice the cause for trial, but might make the motion in all cases, where the plaintiff had neglected to bring the cause to trial, according to the course and practice of the court.

At the time of that decision, the 21st rule of the supreme court was in force, and was identical with the present 27th rule. It had been adopted in August, 1852. In August, 1854, it was repealed, and no similar provision adopted. In August, 1858, the former rule was restored. It is as follows :

“ Whenever an issue of fact shall have been joined in any action, and the plaintiff therein shall fail to bring the same to trial according to the course and practice of the court, the defendant may move for the dismissal of the complaint with costs. If it be made to appear to the court that the neglect of the plaintiff to bring the action to trial has not been unreasonable, the court shall permit the plaintiff, on payment of costs to bring the said action to trial at the next court where the same is triable.”

Under the 27th section of the Code, authorizing a dismissal of the complaint, in case of an unreasonable neglect on the part of the plaintiff to proceed in the cause, under the rule referred to, and the case in our own court before cited, it is plain that the fact of the ability of the defendant to notice the cause and put it on the calendar, does not preclude him from making this motion. If he is not bound to notice it, his actually doing so himself may not clear him. It is the plaintiff’s neglect which it is the object of the provisions in question to prevent or punish.

I think, therefore, that the fact of the defendant having noticed the cause for three terms, is not an answer to the present motion, and that the cases holding otherwise do

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not form the rule in our court. (*See Moeller agt. Bailey, 14 Howard, 359.*) It deserves notice that in that case Justice **Harris** notices the repeal of the rule of 1849-1852, now re-adopted in 1858, and decides the case before him mainly on the ground of that repeal.

The affidavit of the defendant's attorney makes out a case within the rule warranting the order.

The plaintiff's attorney shows that he did not put the cause on the calendar for April term, nor file a note of issue; but he says it was through inadvertence in his office or on the part of his clerk. The clerk refused to put it on the calendar, as no note of issue had been filed. He then commenced to prepare papers for a motion for that purpose, but abandoned it on account of the absence of a witness.

He filed a note of issue with the clerk, for May; but his note of issue caused it to be placed at the foot of the calendar. It remained in the same wrong position through May and June. The clerk refused to correct it, and omitted to apply to the court for the reason of the absence of a witness, and the intended absence of the plaintiff.

The plaintiff, upon the trial in February, had liberty to withdraw a juror. Some irregularity occurred in placing the cause on the calendar for March. It is not necessary, nor perhaps possible, on the papers to say positively that the plaintiff was in fault.

Looking at the course of the plaintiff's attorney in the most favorable light, it is just possible to hold that his neglect has not been unreasonable. To place a cause on the calendar in a position far below its proper place, and neglect to correct it, is a more serious violation of practice than to omit the act entirely.

I cannot let the plaintiff try his cause, except upon the payment of costs; and these costs I understand to be the whole costs accrued. The 26th rule provides that upon a stipulation, the costs to which the defendant is entitled up

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to that time must be offered. The previous clause of the 27th rule speaks of a dismissal of the complaint with costs; and the permission to try at the next court given as matter of favor, "on payment of costs," seems to me to mean the same costs.

The restoration of the rule of 1849, if duly enforced, will be very effectual to render a plaintiff diligent in the prosecution of his action, and relieves a defendant from preparation of a cause and its attendant expense, in a considerable class of cases.

The order will be that the complaint be dismissed, unless the plaintiff, within ten days after service of a copy of this order, and a copy of the costs of the action as adjusted, pay the same to the defendant's attorney. In case of such payment the plaintiff is permitted to bring the cause to trial at the next trial term of this court.

As some doubt has existed upon the practice, no costs are allowed of the present motion.

SUPREME COURT.

JONATHAN DWIGHT agt. DAVID P. WEBSTER, and others.

In an action for the foreclosure of a mortgage, for non-payment of interest, whereby the whole principal sum becomes due, it is not a valid defence that the defendant was unable to find the plaintiff in season to make the required payment—no trick or fraud being attributed to the plaintiff. (*See to the same effect Ferris agt. Ferris, 16 How. Pr. R., 102.*)

New York Special Term, January, 1860.

MOTION to set aside judgment of foreclosure by default.

LEONARD, Justice. This action is brought to foreclose a mortgage containing a clause making the whole principal sum due, in case the interest shall remain unpaid for a certain number of days after it has become due.

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The complaint alleges a default in the payment of the interest under this clause.'

The answer admits this default; but alleges, as an excuse, that the defendants were unable to find the holder of the mortgage, until after the period required for the payment of interest, in order to prevent the whole principal from becoming due, had expired. A judgment by default has been taken at special term, which the defendant now applies to the court to set aside.

If the answer set up a valid defence, the motion ought to prevail. The answer does not allege any trick or fraud on the part of the plaintiff to prevent the payment of interest. It simply presents the misfortune of the defendants in being unable to find the plaintiff in season.

This does not present any fault on the plaintiff which would prevent him from insisting on a fulfillment of the terms of the mortgage. Nor is it such an accident or misfortune as will enable the court to afford the defendants any relief.

The case of *Ferris agt. Ferris*, (16 *Howard's Pr. R.*, 102,) is decisive of this question.

It is not necessary to refer to the other facts contained in the affidavits, as the view which I have taken of the answer is conclusive against the legal force of the whole defence.

COURT OF APPEALS.

JAMES B. WILSON and SANFORD COBB agt. WILLIAM P. ROBERTSON, and others.

Where the partnership effects of an insolvent firm are assigned to pay preferred private debts of one of the partners, for which neither the firm nor his co-partner were liable, the assignment is *fraudulent and void* as against the creditors of the firm.

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(The supreme court in this case, and in the case of *Coe agt. Platt*, *ante* page 121, and perhaps in several others, held that this provision in the assignment violated no statute, but only a principle of the common law which gives partnership creditors a preference in payment out of partnership property over the individual creditors of the several partners. Hence where there was no actual fraud, it did not invalidate the whole assignment. The provision being an illegal one, but not fraudulent, did not vitiate any other part of the assignment. This decision, of course, overrules those of the supreme court.—R.R.P.)

APPEAL from judgment rendered by the supreme court of the 4th judicial district.

H. C. VAN VORST, *for plaintiffs and appellants.*
A. J. PARKER, *for defendants and respondents.*

WRIGHT, J. The referee found that the assignees immediately upon the execution of the assignment, took possession of the assigned property, and proceeded to discharge the trust. The question of fact was determined against the view taken by the plaintiffs, and there being some evidence, though perhaps slight, to sustain the finding, it is not open for review in this court. Hence the ground that the transfer was fraudulent for the reason that there was no change of possession of the assigned estate cannot now be passed upon.

An assignment by an insolvent debtor of his property to trustees for the benefit of creditors, which expressly authorizes them to sell the property upon credit, is void as against the creditors of the assignor. (*Barney agt. Griffin*, 2 *Const. R.*, 365; *Nicholson agt. Leavitt*, 2 *Seld.*, 510.) But an assignment will not be construed as conferring this authority when its language is consistent with a different interpretation, which makes it legal and valid. In *Kellogg agt. Slauson*, 1 *Kern.*, 302, the authority to sell was conferred in the precise language of the assignment in question, yet the assignment in that case was held valid. The case is a direct adjudication of this court, that a power of sale expressed in the identical terms of the

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instrument under consideration, is not obnoxious to the objection that it is an authority to sell on credit, or was so intended by the assignor. The point is no longer open for discussion. (See *Whitney agt. Krows*, 11 *Barb.*, 198.)

There is, however, in my judgment, a fatal objection to the present assignment. The partnership effects of an insolvent firm are assigned to pay preferred private debts of one of the partners, for which neither the firm nor his co-partner were liable. There is no controversy as to the facts touching the question. In April, 1847, Crocker and Staples formed a co-partnership in the mercantile business, in the county of Washington, and prosecuted the business until June 17, 1850, incurring firm debts for their stock in trade, amongst which was three on which the plaintiffs' judgment was recovered. On the 17th of June, 1850, as the referee finds, they were insolvent and unable to pay their debts; and in fact the evidence showed that they were unable to discharge in full even the claims of preferred creditors. Being thus insolvent, they executed an assignment in trust for creditors. The instrument purported to assign and transfer all the property, real and personal, of the firm, or of either of the members of it, more particularly described in a schedule annexed. It embraced partnership property wholly, with the exception of a house and lot, the individual property of Crocker, which was encumbered by two mortgages for more than the value.

The assignment directed the conversion of the estate into money, and after deducting the expenses of executing the trust, the assignees, with the residue or net proceeds and avails, were to first pay and discharge in full the debts due or to become due from Crocker and Staples, or either of them, or for which they or either of them were liable, to Joel Colvin, and seven other persons, (naming them,) together with all interest money due or to grow due

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thereon; and if the avails were insufficient to discharge the same in full, then they were to be paid *pro rata*.

Of the eight persons enumerated in the first preferred class of creditors, it is admitted in the answer of the defendants that five of them, having claims for over \$1,200, were private and individual creditors of John D. Crocker, one of the assignors, and that the debts existed against Crocker at the time of the formation of the partnership in April, 1847.

In the second class of preferred creditors, eleven persons were named, three of whom were the private creditors of Crocker, having claims for over \$500, and which debts existed against him prior to April, 1847. The whole amount of the preferred debts was about \$2,500, of which over \$1,700 were private liabilities of Crocker, whilst the value of the assigned estate was but little beyond the sum of \$2,000.

In the third class were partnership creditors not before preferred. In the fourth class were the private creditors of each of the assignors, not before preferred; and, lastly, the surplus, if any, was reserved to the assignors jointly. The question, therefore, is distinctly presented whether it is a fraud upon the creditors of an insolvent firm for such firm to assign the partnership effects in trust to pay the private debts of the individual members, to the extent of nearly exhausting the joint fund, or to any extent, where such fund is employed to satisfy the creditors of the firm. The question cannot be said to be embarrassed by the fact found by the referee, as to the amount of capital contributed by each of the partners in April, 1847. Nor by the still further suggestion made on the argument, that it was a joint and several assignment of a mixed fund to pay both private and partnership debts. It was a joint assignment of the joint property and funds, and although Crocker's equity of redemption in the lot and dwelling may have

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passed to the assignees under the assignment, there was nothing thereby added to the fund.

The supreme court held that the provision violated no statute, but only a provision of the common law, which gives partnership creditors a preference in payment out of partnership property over the individual creditors of the several partners. Hence it did not invalidate the whole assignment by rendering it fraudulent and void. Being inequitable in reference to the partnership creditors, and an infringement of their rights, the provision was an illegal one; but not being fraudulent it did not vitiate any other part of the assignment. It may be true, (though it is not free from doubt,) that if an assignment contains a provision to pay individual debts out of partnership property, and this is not a violation of any statute, it cannot be set aside at the instance of a single creditor seeking to appropriate the funds to his own individual benefit. But it is unnecessary to follow up this inquiry, as it seems as plain that the insertion of such a provision in an assignment of the partnership effects of an insolvent firm is a violation of the statute in respect to fraudulent conveyances, and furnishes conclusive evidence of a fraudulent intent on the part of the assignors. Its operation in this case was not only to hinder and delay the plaintiff's, as creditors of the firm, but if successful to cheat them out of their entire demand.

It will be conceded that the creditors of the firm are legally and equitably first entitled to the partnership effects. Such creditors have a prior claim upon the joint effects to every other person, which the court will enforce and protect alike, against the individual partners and their creditors.

Indeed the partnership property must be exhausted in satisfying partnership demands, before resort can be had to individual property of the members of the firm. The firm is not liable for the private debts of one of its mem-

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bers, nor is there any liability resting upon the other members in respect to these debts. An appropriation of the firm property to pay the individual debt of one of the partners, is in effect a gift from the firm to the partner; a reservation for the benefit of such partner or his creditors to the direct injury of the firm creditors.

Can it be reasonably doubted that when an insolvent firm assign their effects for the payment of the private debts of a member, for which neither the firm nor the other members, nor the firm assets nor the interests of the other members therein are liable, such an assignment and appropriation are not a direct fraud upon the joint creditors of the assignors?

An insolvent co-partner, says the late chancellor, who was unable to pay the debts which the firm owed, would be guilty of a fraud upon the joint creditors if he authorized his share of the property of the firm to be applied to the payment of a debt for which neither he nor his property was liable at law or in equity. (*Kirby agt. Schoonmaker, 3 Barb. Ch. R., 48; Buchan agt. Sumner, 2 Barb. Ch. R., 207.*) Yet the co-assignor and co-partner, Staples, does that in this case.

the co-partner
The prior right of the creditors of the firm to its effects cannot be impaired by any consideration having reference to the interest of the individual partners; and anything which defeats this right, or hinders or delays such creditor in enforcing payment of his demand against the firm from the firm property, is a violation of the statute, and a fraud upon such creditor.

In this case, Crocker and Staples, in June, 1850, after being in business over three years, find themselves insolvent and unable to pay their debts. They have on hand firm property and assets (perhaps created by the partnership debts,) upon which the creditors of the firm have an equitable lien, and a priority of right to enforce payment.

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It is possible that the law would tolerate an assignment of this partnership property in trust for the benefit of creditors of the firm giving preferences among them, provided there was an absolute and unconditional surrender of the entire estate to the payment of the firm debts, but no further.

The partnership property is assigned by the firm to trustees, not to pay the partnership debts but the preferred private debts of creditors of one of the partners, which neither the firm nor Staples, the other partner, were liable in law or equity to pay; thus not unconditionally surrendering the effects of the firm for the benefit of those to whom they rightfully belonged, but creating a trust by which the prior right of the creditors of the firm to such effects is postponed or hindered and delayed in its enforcement. The chances of the firm creditors being paid from the partnership fund are made to depend upon its sufficiency to pay the private debts of Crocker, preferred in the first and second classes of the assignment, which are to be paid in full before the plaintiffs or any other creditors of the firm, and who are provided for in the subsequent classes, are to be paid anything. This hindrance and delay is the inducement to the trust, and the main purpose for which it was created. The act defeats the right of the plaintiffs, as creditors of the firm, to seize and compel the payment of their demands against such firm from its effects; and the firm being insolvent and its effects insufficient to reach or pay the plaintiffs, as creditors of the firm, who are provided for in the third class, the assignment and its provisions not only hinders and delays the plaintiffs, but defrauds them of their whole demand. Having such an effect it cannot be doubted that the assignment was a fraud upon the plaintiffs.

The firm nor Staples was not liable in any way to the private creditors of Crocker, and the attempt to assign partnership property to pay the private debts of one of

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the partners, after the firm was insolvent, affords a conclusive presumption of an actual fraudulent design on the part of the assignors. Neither the firm nor the co-partner, Staples, were in a condition to make a gift of the firm assets to Crocker, or his creditors; or in substance to reserve from the joint and partnership fund the larger proportion of it for his and their benefit. It is thus fraud that we should sanction, by upholding the trust in the present case. In *Colloms* agt. *Caldwell*, (16 N. Y. R., 484,) an assignment was adjudged void as to the individual creditors of the assignors, where the members of an insolvent mercantile firm assigned their partnership property in trust for the payment of their partnership debts, reserving any surplus that should remain to the assignors. The individual property of the members of the firm was appropriated to pay partnership debts, and any surplus reserved to the assignors, whilst the individual debts of one of the members of the firm were left unprovided for. This attempt to tie up the whole fund under a trust, and after the trusts were satisfied reserving any surplus to the assignors, without making provision for paying the individual debts, was adjudged to afford a conclusive presumption of an actual intent to defraud the individual creditors of the assignors. So also an assignment of the effects of an insolvent firm to pay the private debts of individual members, as was done in the case at bar, hindering and delaying, and postponing, the collection of the demands of the company creditors, is equally fraudulent and void as to such latter creditors. Indeed, independent of the question of fraud, it may be seriously doubted whether the assignment should not be regarded as executed and the trust made for the benefit of the assignors, or one of them, and thus void under the statute declaring "all transfers and assignments of goods, &c., made in trust for the use of the person making the same, void as against the creditors of such person." (2 R. S., 135, § 1.)

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The assignment is made for the benefit of Crocker, as its purpose is to liquidate and discharge his individual debts. The transfer may therefore be said to be made in trust for the use of one of the assignors. This is the spirit of the transaction, if not its legal effect. Crocker is entitled to appropriate the partnership funds to relieve himself from individual liability.

Having reached the conclusion that the assignment is void as against the plaintiffs, as creditors of the firm of Crocker and Staples, it is unnecessary to discuss the further questions raised, viz: whether Staples, one of the assignors and a defendant, and the private creditors of Crocker, the assignor, were properly admitted as witnesses.

The judgment of the supreme court affirming the judgment of the referee, adjudging the assignment valid and dismissing the plaintiff's complaint, must be reversed and a new trial granted.

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SUPREME COURT.

THE PEOPLE *ex rel.* WILLIAM WILLSON agt. WILLIAM E. LATHROP, treasurer of the city of Rochester.

Held, in this case, 1. That it is the duty of the common council of the city of Rochester to raise the amounts necessary to support the public schools, and the payment of teachers, by the requisite taxes for that purpose; and the common council may raise in its discretion such sums as it may deem proper to purchase sites, build and repair school houses, within the limits prescribed by the charter for that purpose.

2. It is the duty of the board of education of the city of Rochester, and it has the requisite power in its discretion, to disburse all such money raised and received according to law, in purchasing sites, building and repairing school houses and supporting teachers, and discharge all the contingent and incidental expenses connected therewith.

3. The board of education can make no valid contracts except for the disbursement of the money raised, received and appropriated by law, and subject to its order for expenditure during each current school year, or which may remain in the treasury unappropriated by previous boards.

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4. It is the duty of the board of education to distinguish in its drafts and orders upon the moneys in the hands of the treasurer, between moneys drawn for building and repairing school houses, and moneys drawn and appropriated for the payment of teachers' wages; and these funds should be kept distinct in the books of the city treasurer, and in the books of the school superintendent.

The draft in this case in favor of the relator, being upon its face an order to pay money for the building of a school house, and to be charged to that fund, the treasurer rightfully refused to pay it, there being no money in the treasury applicable to the payment of such order.

In refusing to make such payment the respondent simply performed his duty as treasurer of the city, intrusted with the public moneys, to keep faithfully such moneys, and allow no unlawful appropriation or diversion of the same from the particular object for which they were raised and designed by law.

Monroe Special Term, March, 1860.

MOTION for peremptory mandamus on notice.

In pursuance of section 175 of the charter of the city of Rochester, the common council, on the 15th day of June, 1858, certified to the board of education that it would place at the disposal of that board the sum of \$10,000, for the purpose of building school houses and purchasing sites for the current school year. Shortly afterwards the common council reduced the amount to \$5,000, which last mentioned sum, and no more, was raised by tax for that purpose.

The board of education during that year expended more money than was raised for that purpose, so that at the commencement of the school year for 1859 (first Monday of April) the building fund was overdrawn to the amount of \$6,271.51. Such being the condition of that fund, the common council, at the commencement of the school year 1859, notified the board by their certificate that it would raise no money for that year for the purpose of building school houses and purchasing sites.

At a subsequent meeting held June 14, 1859, in levying the general city taxes, an item was included of \$5,000, "to purchase and improve sites, and to build school houses." This was never certified to the board of education, as section 175 of the charter requires. The respondent, as city

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treasurer, gave the board credit for this \$5,000 on his books.

The school superintendent, with no other authority than the printed minutes of the common council, credited the building fund with it on the books of the board. The superintendent keeps the books of the board of education and the separate funds of the board. The city treasurer keeps but one fund, into which he puts all moneys belonging to the board of education.

Such being the condition of the finances, the board of education for 1859 made executory contracts for building and improving school houses, and purchasing sites, to the amount of nearly \$30,000. One of those contracts was made with the relator, for the construction of a school house in district number seven, at a cost of \$4,945.

At the time he entered into the contract the relator made inquiry of the president of the board of education as to the condition of the finances of the board, and was informed by the president that the building fund was largely overdrawn, and that, if the relator took the contract, there was no money which could be applied upon it that year. The condition of the building fund was well known, both to the relator and the board of education, at the time the contract was made.

The relator commenced work on his contract, and the board of education voted him a payment of \$800 for work done thereon, and drew its order on the city treasurer for the amount, payable "when there is money in the treasury applicable to that purpose," and charge the same to the building fund. The treasurer refused to pay the draft on the grounds:

1st. Because there was no money in his hands applicable to the payment of the draft.

2d. Because the relator's contract was void, it having been made in violation of section 171 of the charter.

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The relator applied to this court, on notice for a peremptory mandamus, requiring the respondent to pay the draft.

T. C. MONTGOMERY, *for relator.*

J. VAN VOORHIS, JR., *for respondent.*

E. DARWIN SMITH, Justice. The relator asks for a peremptory mandamus from this court, requiring the respondent, as treasurer of the city of Rochester, to pay to him the sum of \$800, upon the order of the board of education of said city, given in pursuance of a resolution of said board, passed October 31, 1859, to apply upon a contract for building a school house in said city. The order, upon its face, directs the said treasurer to pay the sum therein specified to the relator when there is money in the treasury applicable to the purpose, and charge the building fund in pursuance of said resolution of the said board of education.

The respondent has refused to pay such order, upon the ground that there is no fund in the city treasury subject to the order of the board of education, applicable to the payment thereof. If this be so, the treasurer obviously could not lawfully pay the order in question, and this application must be denied.

It appears, and is undisputed, that at the time when the relator presented the said order to the respondent for payment, that there was, in fact, in the hands of such treasurer, money raised to improve sites and build school houses, more than sufficient in amount to pay the relator's claim; and it remains, therefore, to inquire whether such money was applicable to the payment of debts contracted by the board of education for the building of school houses in the year 1859.

The charter of the city of Rochester confides the government, control and care of the schools and school houses, and of all things relating thereto, to the board of educa-

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tion, and constituting such board a corporation, with certain specific powers.

The moneys for the support of such schools, so far as it is not received from the state, and also the money required for the building and repair of school houses, and of all contingent expenses connected therewith, is raised by taxes imposed by the common council of said city, annually, in the same manner as other taxes.

It is the duty of the common council, under section 167, by tax, from time to time to cause to be levied equally upon all the real and personal estate in said city, such sums as may be necessary or proper for the purposes aforesaid, subject to the restriction in subdivision number six of said section, that the amount to be raised in any one year "to lease, alter, improve and repair school houses, and their out-houses and appurtenances, shall not exceed \$3,000; and for the purchase of sites, and building and enlarging of school houses, shall not exceed \$10,000." The moneys, when so raised, and all moneys by law raised or appropriated to, or provided for the support of said schools, are to be paid to the city treasurer thereof; and all such moneys are, by section 176, required to be deposited for safe keeping with such treasurer, *to the credit of the board of education*, and are to be drawn out in pursuance of a resolution or resolutions of such board, by drafts drawn by the president and countersigned by the clerk of said board, payable to the order of the person entitled to receive such moneys. The draft of the relator is in due form under these provisions.

The moneys raised for the support of the schools, and for the payment of teachers' wages, as well the public moneys received from the state, as those raised by the common council by taxes, the charter clearly designed to keep distinct from the funds raised for building and repairing school houses. Section 171 makes it the duty of the board of education to keep these funds distinct, and not

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to exceed in their drafts upon either fund, during the current year, the amount provided for the particular expenditure in question.

It is clearly the duty of the board of education to keep these funds distinct in their accounts; and I think, also, it is by necessary implication of law the duty of the city treasurer to do so, and not to pay the drafts of the board of education unless there are funds in the treasury applicable to the purposes for which such drafts are drawn respectively.

Although there are, confessedly, funds in the treasury sufficient to pay the relator's draft, yet I think the respondent, as a faithful public officer, was bound to refuse payment if the order was unlawfully drawn. The question, then, for my consideration and decision is, whether the funds in his hands were lawfully applicable to the payment of the relator's draft. This court certainly ought not to require payment of said order, upon the assumption that the board of education may violate the law, by drawing indiscriminately upon the funds in the hands of the treasurer, subject to its order, in distinct disregard of their plain duty and the obvious intent of the law, that the funds for teachers' wages, and for the building and repairing of school houses, shall remain and be kept distinct, and be so used and appropriated.

It appears that on the 15th June, 1858, the common council certified to the board of education, pursuant to section 175, that it would place at the disposal of the board the sum of \$10,000, for the purpose of building school houses and purchasing sites for the then current school year, which commences on the first of April of each year, when a new board of education goes into office; and that subsequently the amount was reduced to \$5,000, and only that sum in fact raised.

It also appears, that at the commencement of the school year of 1859, the funds for building and repairing school

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houses had been overdrawn \$6,271.51. How this sum could be drawn from the treasury, in violation of law, I cannot conceive, except upon the ground that the board of education violated the law in drawing drafts upon the moneys in the hands of the treasurer, without distinguishing between the funds for the payment of teachers' wages and the funds for building and repairing school houses; and the city treasurer negligently paid such unlawful drafts without regarding this distinction.

In consequence of this overdraft upon the building fund in 1858, the common council, it seems, sought to rectify this misappropriation, by refusing to raise any money in the year 1859 for the building fund. But, it seems, after such refusal, and after certifying the same to the board of education, the common council did in fact raise \$5,000 to improve sites and build school houses, and the same was included in the general tax of that year, but the amount was never certified to the board of education pursuant to section 175; but that omission I do not think a matter of any importance. It is this \$5,000, which was in the hands of the respondent, except the sum of \$1,429.85, drawn therefrom when the relator presented his draft for payment as aforesaid.

This \$5,000 was, doubtless, raised and intended to meet, so far as it would go, the overdraft upon the building fund of the previous year; but being raised by the authority of law, for a specific object, it could not legally be diverted to any other purpose; and the common council, I think, could not appropriate it to meet or make up past illegal overdrafts. The common council, doubtless, possess a discretionary power to determine how much money they will raise in each year for the building and repair of school houses and the purchase of sites; but when the money is raised, and placed in the hands of the treasurer, it has passed obviously beyond their control. The responsibility of determining how much money for such purpose shall be

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raised in each year is cast by the charter upon the common council; but the responsibility of distributing the moneys raised for that purpose devolves upon the board of education. The common council can refuse, in any year, to raise any money for the purchase of sites, and building and repairing school houses; but, if it raises the money, the duty and the right in law belongs to the board of education, to expend it in its discretion in building and repairing school houses, and making such alteration thereof and improvements as to that board shall seem proper. This is the very office and design of the board of education, and I think it cannot be doubted that, in the discharge of its appropriate duties, it may make all proper contracts like any other corporation. The only limitation upon its power to contract within the scope of its duties, is, I think, that it can make no valid contract, except for the expenditure of the public moneys furnished and provided for its use and expenditure by law. Its powers are special to use and expend, within the current school year, the money with which it is intrusted; and it may lawfully contract to that extent, and no further, except under section 182, to lease suitable rooms for the accommodation of schools in the case therein specified.

This brings me to the inquiry, whether the relator's contract was valid, which is disputed. I have no doubt of its invalidity, upon the principles above stated, as an executory contract. The board of education could not bind the city—could not bind itself—and could not create any valid obligation by contract beyond the funds placed under its control for the current school year. But if the board of education undertake to build a school house, so far as the work proceeds it may, at any time, lawfully make payment from the money at its disposal for such purpose; and the work begun by one board may, doubtless, be paid for by its successors. Although the work done by the relator, therefore, was performed upon an

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invalid contract, yet the board of education, at any time hereafter, when it has funds applicable to the building of school houses, can, doubtless, lawfully pay the relator for the work done under such contract.

While it is true that the board of education is a corporation, yet this is so only to a qualified extent. It is a corporation only for *public purposes*, and for the discharge of trusts purely of a public nature. It has continuity, although the commissioners who exercise its powers are changed annually. Yet I think it was the intent of the charter that each separate board of commissioners should exercise its power like other public officers elected annually, and that each board should not bind its successors by continuing contracts. It is with this object that each board is to certify, on or before the first day of September of each year, the sums in their opinion necessary and proper to be raised under section 167, specifying the sums required *for the year commencing on the first day of April thereafter*.

The intent of this provision was that each board should make this certificate, with the view that the funds to be raised in pursuance thereof should be provided for the use and expenditure of the board of commissioners next to go into office, on the first Monday of April thereafter. They are not to certify to raise funds for the use or expenditure of the board making the certificate.

This view is confirmed by section 175, which provides that the common council, "within fifteen days after receiving such certificate, shall determine and certify to the said board of education the amount that will be raised by them *for the year commencing on the first Monday of April thereafter*, for the purpose mentioned in section 167."

In view of this obvious intent of the charter, that each new board of education should commence the school year with the funds raised by taxes, and otherwise in the previous year, it is claimed by the counsel for the respondent

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that the \$5,000 raised in 1858 for building and repairing school houses, having been exhausted before April 1, 1859, and there being at that time not only no money in that fund, but it being in debt for overdrafts to the amount of \$6,271.51, the money raised by tax for building school houses in 1859 belongs to the school year of 1860, and is not applicable to the payment of the relator's draft for that reason. I cannot see why this is not so. It seems to me quite clear, that the scheme of the charter for the control and management, and support of the schools, was to provide in advance by annual taxes, in connection with the public moneys received from the state annually for the support of the schools, &c., in and for successive annual periods; that each new board of commissioners, coming into office on the first of April, should have the specific funds previously provided and placed in the treasury subject to its order, in manner above specified for its expenditure during the school year; that it was to have power to expend such moneys and contract for the expenditure thereof, and no other or greater sums; and if there was no money in the treasury subject to its order, it could make no contract and incur no debts, except under section 182, as above mentioned. It never was the design of the charter to allow one board of education to contract debts binding on the city or its successors in office, except so far as funds were provided to meet such contracts. The school commissioners comprising the board of education, possess little more of authority than school commissioners and school trustees in the towns; they act by a corporate name, but they have only certain specific duties to perform, particularly defined, and can exercise no powers not expressly conferred, except such as are incidental to all public bodies and necessary for the proper discharge of the duties imposed upon them. Section 171 is a further confirmation of this view. It declares that it is the duty of said board, "in all their expenditures and contracts, to

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have reference to the amount of moneys which shall be subject to their order during the *current year*," (from April first, when they enter upon the discharge of their duties, till the ensuing first of April,) "for the particular expenditure in question, *and not to exceed that amount*." These provisions of the charter were framed with reference to the imposition of the taxes in the fall of each year, and the collection through the ensuing winter, as was formerly the practice; but they remain yet in force, notwithstanding the time for the imposition and collection of taxes has since been changed by amendments of the charter.

The \$5,009 raised in 1858 was, in my opinion, unlawfully expended before the first of April, 1859. On the first of April, 1859, the moneys which belonged to the current school year from April 1, 1859, to April 1, 1860, for building and repairing school houses, had been expended, and the funds for that purpose had been overdrawn \$6,271.51.

When the relator made his contract, therefore, with the board of education, September 2, 1859, to build a school house in district number seven, there was no fund for building school houses subject to the order of the board, and they had no power to make such contract, of which it appears that the relator was distinctly informed at the time by the president of the board of education.

The contract being thus entirely unauthorized, the resolution to pay the \$800 thereon was likewise unauthorized and void, and the relator is not entitled to payment thereof.

If one board of education could thus make contracts without any funds on hand with which to fulfill them, and bind their successors with debts thus incurred, the whole policy and theory of the charter in respect to the support of the public schools would be defeated, and debts might be contracted in advance of moneys to be raised for an indefinite period, and to an unlimited extent, by an improvident board of education.

The law is not so defective as to allow such a mischiev-

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ous consequence to occur. The \$5,000 raised by tax in 1859 belongs to the current year, from April 1, 1860, to April 1, 1861, and is subject only to orders drawn thereon by the authority of the new board which went into office on the first Monday of April instant. If such board thinks proper to recognize the claim of the relator, it will be entirely lawful for it to draw a new order upon the respondent for its payment, and to complete the school house in district number seven, provided for in the relator's contract.

If the members of the board of education, the school superintendents, or any other corporate officer, makes contracts or pays money without authority of law, they are subject to the ordinary responsibility of all agents assuming to act without authority; they are personally liable on their contracts, and for the misappropriation of the public moneys, and for willful violation of duty in misappropriating the public moneys, and also liable to indictment. I will re-state the views I take of the questions presented in this case for my decision involved in its considerations.

It is the duty of the common council to raise the amounts necessary to support the public schools and the payment of teachers, by the requisite taxes for that purpose, and the common council may raise in its discretion such sums as it may deem proper to purchase sites, build and repair school houses, within the limits prescribed by the charter for that purpose.

It is the duty of the board of education, and it has the requisite power in its discretion, to disburse all such moneys raised and received according to law in purchasing sites, building and repairing school houses, and supporting teachers, and discharge all the contingent and incidental expenses connected therewith.

The board of education can make no valid contracts except for the disbursement of the money raised, received and appropriated by law, and subject to its order for

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expenditure during each current school year, or which may remain in the treasury unappropriated by previous boards.

It is the duty of the board of education to distinguish in its drafts and orders upon the moneys in the hands of the treasurer, between moneys drawn for building and repairing school houses, and moneys drawn and appropriated for the payment of teachers' wages, and these funds should be kept distinct in the books of the city treasurer and in the books of the school superintendent.

The draft in this case in favor of the relator being upon its face an order to pay money for the building of a school-house, and to be charged to that fund, the treasurer rightfully refused to pay it, there being no money in the treasury applicable to the payment of such order.

In refusing to make such payment, the respondent simply performed his duty as treasurer of the city intrusted with the public moneys, to keep faithfully such moneys, and allow no unlawful appropriation or diversion of the same from the particular object for which they were raised and designed by law.

The application for a mandamus must be denied, with \$10 costs.



SUPREME COURT.

JOEL WOLFE agt. THE SUPERVISORS OF THE COUNTY OF RICHMOND.

It is never necessary in a complaint for injury to the person or property, to aver that the act did not occur through the *negligence* or *carelessness* of the plaintiff. Therefore, in an action under the statute of 1855, ch. 428, where the complaint averred "that the plaintiff was the owner of goods and chattels in the town of Westfield; that a riot was there committed by certain persons, and the dwelling-house in which such goods and chattels then were, was set on fire by a mob, and the property of the plaintiff was thereby destroyed,"

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Held, sufficient. It was not necessary for the plaintiff to aver that he did not aid in, assist or permit the destruction of the property.

Where the complaint averred that the statute was passed by the legislature, *held*, that the objection that the act was not passed by a three-fifth vote, could not be taken on demurrer. The presumption from the averment is, that it was properly passed.

The act of 1855 *held* not unconstitutional, as violating the 1st section of the 10th article of the constitution, which says: "The county shall never be made answerable for the acts of the sheriff." The only ground of liability under this statute, is the existence of a *mob*, or *riot* in the county, and the destruction of property by such mob.

INGRAHAM, Justice. The plaintiff claims to recover damages for property destroyed by a mob in the county of Richmond. The complainant avers that he was the owner of goods and chattels in the town of Westfield; that a riot was there committed by certain persons, and the dwelling house in which such goods and chattels then were was set on fire by a mob, and the property of the plaintiff was thereby destroyed. The complaint further avers that the plaintiff was not apprised of any threat or attempt to destroy or injure his property.

The defendants demur to the complaint, for the cause that it does appear on the face of the complaint that the same does not state facts sufficient to constitute a cause of action.

This action is brought under the statute of 1855, ch. 428, which provides that any city or county shall be liable to an action by or in behalf of the party whose property was thus destroyed or injured for the damages sustained by reason thereof.

It is not necessary for the plaintiff to aver in the complaint that he did not aid in, assist or permit the destruction of the property. He avers that the act was done by the mob, and there is nothing in the statute which requires any other averment. It is never necessary in a complaint for injury to the person or to property, to aver that the act did not occur through the negligence or carelessness of the plaintiff. That may be shown by the defendant as

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matter of defence upon the trial; but it is not necessary to be averred in the complaint, any more than it is necessary upon the trial for the plaintiff, in making his case, to prove in the first instance that he was not at fault, either through carelessness or negligence. The defendant may prove it, and if any proof of that character is offered, the plaintiff then, and not before, is required to show that he was free from such fault.

The objection that the act of 1855 was not passed by a three-fifth vote, cannot be taken on this demurrer. It does not appear on the face of the complaint that any such objection exists. The complaint avers that the statute was passed by the legislature. In the absence of any proof on that subject, we must presume that it was properly passed.

The only objection remaining is to the constitutionality of the act of 1855. This does not involve any question as to the power and authority, or as to the liability and duty of the sheriff. That he has power to suppress riots, and for that purpose to use the whole force of the county, cannot be doubted. But the action is not founded on any injury arising from the act of the sheriff. It is the reverse. It rests entirely on the acts of those engaged in the riot, whether they were committed in consequence of the inability or neglect of the proper authorities to maintain the peace by preventing or suppressing riots. Upon the same principle, acts of negligence by corporate authorities are the grounds of action by individuals whose property is damaged by, or in consequence of such negligence, when, if the injury had arisen from the acts themselves, properly performed, no damage could be recovered. The cases of *The Mayor, &c.*, agt. *Freeze*, (3 *Hill*, 612,) *The Mayor, &c.*, agt. *Lloyd*, (1 *Seld.*, 369,) *The Mayor* agt. *Huston*, (5 *Seld.*, 163,) and others cited in those cases, are in point to show that such actions may be maintained for negligence causing damage. And *Wilson* agt. *The Mayor, &c.*, (1 *Denio*, 595,)

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is important to show that by acts legally done, although injurious, no liability exists.

The statute, (1 R. S., 384,) provides for bringing actions against a county in the name of the board of supervisors. I do not understand the defendants as objecting to the mode in which the action is brought; but to the power of the legislature to impose upon the county this liability under the act of 1855.

I suppose it must be conceded that the legislature has ample power to declare any act legal or illegal, and to impose liability for damages to a party injured in all cases in which there is no restriction contained in the fundamental law which limits their powers. If the constitution does not affix a limit by prescribing cases in which they may not act, they have full authority to legislate in regard thereto.

The defendants, however, contend that such prohibition is contained in the 1st section of the 10th article of the constitution, which says: "The county shall never be made answerable for the acts of the sheriff." The true construction of this clause is, that for anything done by the sheriff in the discharge of his official duties, the county should not be liable. If it had been averred that the sheriff, while attempting to preserve the peace, illegally took possession of and destroyed the plaintiff's property, this provision would apply and would protect the county from liability. In the present case, however, I do not understand this action to be founded on any claim for damages arising out of the acts of the sheriff. The statute of 1855 does not place the responsibility either on the act of the sheriff, nor as the defendant supposes, on the neglect of the sheriff to act. The only ground of liability is the existence of a mob or riot in the county, and the destruction of property by such mob.

The propriety of charging the people of counties with the consequences of riots within the county is apparent.

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It is not to punish them for the acts or negligence of the sheriff, but for their own conduct in permitting riots to take place. The sheriff could do nothing without the aid of the people. It becomes a matter of interest to them to prevent and suppress riots, if the statute makes them responsible for the damages proceeding therefrom, and although the sheriff is the officer to whom the authority is specially committed, yet there are other officers in the county who, with him, have authority to arrest all offenders against the public peace. It is no more intended to make the county liable for the acts of the sheriff, than for other officers. The provision in the statute which requires notice to be given to the sheriff in the county, requires the like notice to be given to the mayor of a city; but no part of the statute contemplates the liability as limited by the neglect of the sheriff to discharge his duties.

The inability of the sheriff to do what is necessary to suppress a riot, is no more a defence to this action than his neglect would be a ground for it. The liability is irrespective of either, and is imposed for the destruction of property by the riot, whether the sheriff has done all in his power or not to prevent it.

This notice is not for the purpose of fixing any liability on the sheriff. The party whose property is in danger is required to avoid everything which might aid, sanction or permit the injury to be done, and where he knows of the intended injury he is required to use all reasonable diligence to prevent it; and as an evidence that he has used such diligence, he is required to show that he has applied to the sheriff of the county for protection. The notice to the sheriff, so far as the plaintiff's rights are involved, is intended for no other purpose.

The plaintiff is entitled to judgment on the demurrer, with leave to defendants to answer, on payment of costs.

In the Matter of Jerusha Lamoree.

SUPREME COURT.

IN THE MATTER OF JERUSHA LAMOREE, A LUNATIC.

If the *next of kin* of a *lunatic* (legally found such) unite in a petition and name a proper person as *committee*, of the lunatic, or give their consent in writing to the appointment of a particular person, it is usual to select such person the *committee*. But if the *next of kin* have not assented or united in the petition there should be an order of *reference*, and then the *next of kin* are entitled to notice of the proceedings and to propose themselves as the *committee*.

Where a *stranger* is appointed such *committee*, without the request of the relatives and *next of kin* of the lunatic, and without an order of *reference*, and without notice to the persons having a prospective interest in the estate, the appointment will be *set aside* as unauthorized.

Poughkeepsie General Term, May, 1860.

LOTT, EMOTT and BROWN, Justices.

APPEAL from an order of the county court denying motion for the appointment of a *committee* of lunacy.

WILBER & VAN CLEEF, for appellant.

EDWARD CRUMMY, for respondent.

By the court—**BROWN, Justice.** The papers read upon this motion before the county court, afford ground for the belief that the proceedings upon the execution of the *writ de lunatico inquirendo* were not free from some irregularity, and if the principal fact which it was the object of the proceedings to establish and ascertain was left open to any doubt it might be right to set them aside and institute a new inquiry, so that the mental condition of the person affected by them should be established positively and certainly. The lunacy of Jerusha Lamoree is not, as I understand, disputed. Her relatives, and all others who know anything of the state of her mind, concur with the jury in the opinion that she is a lunatic and incapable of managing her affairs, and unfit to govern herself. Under such

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circumstances, no good purpose could be served by vacating the proceedings prior to and including the filing and confirmation of the inquisition, and we are therefore of opinion that the county court did right to deny that part of the motion.

The petitioner upon whose application the proceedings were instituted is Susan Van Wagner, and they were conducted up to the 5th December, 1859, by TALLMAN, PAYNE and LORD, as her attorneys. On that day, by a written consent to that effect, they ceased to act further in that capacity, and WILBER and VAN CLIEF, were substituted in their place.

A petition was prepared, signed and sworn to, by Susan Van Wagner, on the 24th November, 1859, praying for the appointment of Alexander H. Vail, of Schodack, in the county of Rensselaer, and Robert Cunningham, of Hyde Park, Dutchess county, committee of the person and estate of the lunatic. Annexed to it was the written consent of her brother, George Smith, that they be appointed such committee. Cunningham, it appears, is nephew and one of the next of kin of the lunatic, and Alexander H. Vail is her brother-in-law. The time when this petition was presented, and the order consequent upon it obtained, is one of the points in dispute—the moving party alleging that it occurred after TALLMAN, PAYNE and LORD had been superseded in their office as the attorneys of the petitioner, and on that account unauthorized and irregular; while the adverse side allege it was presented and the order obtained for the appointment of the committee on the third day of December, which is the day of the caption of the order.

In the view I entertain of the case, the real time is of little consequence. The order is made upon reading and filing the inquisition, and also upon reading and filing the petition of Susan Van Wagner, and declares that Alfred Duer, of the town of Clinton, be appointed committee of

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the person and estate of the lunatic, upon giving the customary bond in the penal sum of \$25,000.

The real complaint of the moving party is the making of this appointment, and I am constrained to say that the complaint is just; for the appointment of a stranger to execute a trust so delicate and of such responsibility without the request of the relatives and next of kin of the lunatic, without an order of reference, and without notice to the persons having a prospective interest in the estate, is not authorized by the practice of the courts having jurisdiction over such matters.

If the next of kin unite in a petition and name a proper person as committee, or give their consent in writing to the appointment of a particular person, it is usual to select such person. But if the next of kin have not assented or united in the petition there should be an order of reference, and then the next of kin are entitled to notice of the proceedings upon the reference and to propose themselves as the committee.

In the matter of Taylor, a lunatic, (9 Paige, 611,) the chancellor held that it is not a matter of course to commit the guardianship of the estate of a lunatic to those who are presumptively entitled to it upon his death, as heirs or next of kin. But they will be appointed the committee of his estate when it satisfactorily appears to the court they are the persons most likely to protect his property from loss.

Blackstone, in his commentaries, (vol. 1, 305,) after saying that, to prevent sinister practices "the next heir is seldom permitted to be the committee of the person, because it is his interest the party should die," also says: "But it hath been said there is not the same objection against his next of kin, provided he be not his heir, for it is his interest to preserve the lunatic's life in order to increase the personal estate by savings, which he or his family may hereafter be entitled to enjoy. The heir is

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generally made the manager or committee of the estate, it being clearly his interest by good management to keep it in condition, accountable however to the court of chancery and to the *non compos* himself, if he recovers, or otherwise to his administrators."

In ex parte Le Hucp, (18 *Vesey Rep.*, 221,) the master had approved of Mr. Benjafield, a stranger, committee of the estate, in preference to the lunatic's uncle and another who had been proposed, and both were unexceptionable. Lord **ELDEN** sent back the report to be reconsidered, and said: "When strangers are appointed they acquire an influence over the private and domestic concerns of a family, which ought always to be restricted if possible within the circle of the family itself."

The law in dealing with the persons and estates of that unfortunate class who are bereft of reason and intelligence, proceeds upon principles which must commend themselves to the sanction and approbation of every humane and enlightened mind. Considering the close and intimate relations which the committee must maintain with the family and relatives of the lunatic, his power of control—all but absolute—over his person and property, the remote possibility of his ever being in a condition to make any disposition of his estate, which shall prevent its descent and transmission to the heirs at law and next of kin—a rule of practice or of positive legislation which would justify the appointment of a stranger to execute the trust of committee, without the assent and against the will of his family or other relatives, and without any sufficient or adequate cause, would be oppressive and intolerable. It would be little less offensive than to deprive a person of his property without cause, and without the authority of law.

In respect to character, capacity and responsibility, we think Mr. Alfred Duel entirely unexceptionable. But he is a stranger to the lunatic; his name was not proposed

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by any of her relatives, or those interested in the protection and preservation of her estate. They had no opportunity to be heard, for there was no reference to which they could have been summoned.

The petition upon which the appointment was made prayed that to the nephew and brother-in-law of the lunatic might be committed the trust, and no reason is assigned or suggested why they were set aside and another selected. It was indeed suggested as an objection to Alexander H. Vail, that he was not a resident of the county of Dutchess, when the proceedings were had, and hence not amenable to the process of the county court. This objection is futile. He was a resident of the state, and within the jurisdiction of its courts, and subject to their orders and judgments. In this, as in all other trusts of a similar kind, no more limited residence of the trustee is required.

In conclusion, we think the order appointing the committee was improvidently granted, and whenever it was brought to the notice of the county court it should have been vacated. So much of the order appealed from as denied the motion to set aside the proceedings subsequent to the filing of the inquisition is reversed, and such proceedings are vacated and set aside, to the end that the petitioner, Susan Van Wagner, may have an opportunity to renew her application for the appointment of a committee of the person and estate of the lunatic.

No costs of appeal are given to either party.

In the matter of Mary Jane Whitlock.

SUPREME COURT.

In the matter of MARY JANE WHITLOCK and others, infants.

Under the statute providing for the sale or disposition of the real estate of infants, the petition may be presented by a *natural guardian* of the infants, as their "next friend," without an appointment by the court.

The power and duty of such "next friend" is merely to bring the matter before the court, which then takes cognizance of the proceedings, and appoints a responsible *guardian*, authorised to act on behalf of the infants, and takes security for the faithful performance by such *guardian* of his duty.

Where by the contract for the sale of premises, they are to be conveyed *free of incumbrances*: a reservation or covenant in the deed, through which title is derived, that five feet of the front thereof shall not be built upon or used except for steps, &c., is an incumbrance which relieves the purchaser of the premises from performance, where it was unknown to him.

New York Special Term, April, 1860.

MOTION to compel purchaser to complete his purchase on a sale of infants' real estate.

BONNEY, Justice. Under petition in this matter, James B. Wilson has been appointed special guardian of Mary Jane Whitlock and others, infants, and under order of the court has made a contract for the sale of their real estate in the city of New York; which contract has been reported to, and approved by, the court, and said guardian has been, by another order, authorized and directed to carry such contract into effect, and to convey the property on receiving payment therefor.

The purchaser of said real estate refuses to pay the consideration and receive the deed therefor, executed by said special guardian, upon two grounds:

1. He insists, under advice of counsel, that the appointment of said special guardian and all the subsequent proceedings in this matter are void, for the reason that Elizabeth M. Whitlock, by whom, on behalf of said infants, and as their next friend, the original petition was presented,

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was not authorized to represent said infants or to make the application on their behalf.

This is a strictly statutory proceeding, and unless the requirements of the statute have been complied with, no title will pass by the deed. (*Rogers agt. Dill, 6 Hill*, 415.)

The statute provides that any infant seized of real estate may, *by his next friend or by his guardian*, apply for the sale or disposition of the same; and that, *on such application*, the court shall appoint a guardian, &c. (2 R. S., 5th ed., p. 275, §§ 100, 101.)

Mrs. Elizabeth M. Whitlock, by whom, acting as next friend of said infants, the application to the court in this matter was made, was not by any court or legal proceeding appointed such next friend, but being the mother, nearest relative and next of kin of such infants, and as such their *natural guardian*, she assumed the title of their "next friend," and in that character presented the original petition.

Was she such "*next friend*" within the meaning and intendment of the statute above referred to?

In this state provision has been made by statute for the *appointment* of a next friend or guardian *to prosecute or defend any action* that may be brought by or against an infant, who can appear and prosecute or defend only in the manner so provided. (1 R. S., 416, § 2; 2 *id.*, 445, &c., §§ 1 to 12, and p. 232, §§ 40 to 43; *Code*, §§ 115, 116.)

In other cases of legal disability, also, provision has been made for the prosecution and defence of actions by or against persons incapable of acting in their own behalf. (2 R. S., 142, §§ 20 to 34.)

Before these enactments there appears to have been no settled practice or certainty in relation to the appointment, duties or responsibility of the next friend of an infant plaintiff. (*Daniel's Chancery Pract.*, 90, &c.; *Story's Equity Pleadings*, § 57, &c.; 1 *Hoffman's Chancery Pract.*, 54, &c., and cases referred to.)

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The statute under which the proceeding now in question was had, is wholly distinct from the statutes above mentioned, which provide for the appointment of a next friend or guardian of an infant *party to an action*. The words of the statutes are not the same, and the purposes for which a next friend appears and acts under said statutes respectively is wholly different. The next friend of an infant plaintiff directs, and is responsible for the prosecution of the action, and is also liable for costs of the defendants, and to account to the infant whom he represents, for the proper prosecution of his claims, and for any money or property which he may recover or obtain thereby. It is therefore eminently proper that such next friend be approved of and appointed by the court, and required (if necessary) to give security for the performance of his duty.

In the proceeding now in question (which is not an action), the guardian or next friend authorized by the statute to make the application, has no duty to perform or power to act, except merely to bring the matter before the court, which then takes cognizance of the proceeding, and appoints a responsible guardian authorized to act on behalf of the infant, and take security, as provided by statute, for the faithful performance by such guardian of his duty. If the "next friend," before he can present the petition, must be appointed by the court, who shall make the application for his appointment? The statute makes no provision for such an application, and the rule of court clearly intimates that his presentation of the petition is to be the *first* step in the proceeding. (*Rule 66.*)

In my opinion Mrs. Whitlock, the mother of the infants, whose property is contracted to be sold, was their "next friend" within the meaning of the statute, and authorized, without previous appointment by the court, to make the first application in this matter, and consequently the objection made by this purchaser to the authority of the special

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guardian to sell and give title to the premises is not well taken.

2. By the contract for the sale of the premises, they are to be conveyed *free of incumbrances*. The title of the infants is derived through a deed which conveys the lots subject to a reservation or covenant that five feet of the front thereof shall not be built upon or used except for steps, &c. This is undoubtedly an incumbrance on the lots, restricting the owner in the use thereof, and if not excepted in the contract, nor known to the purchaser when he made it, justifies him in refusing to perform it. (*Maxwell agt. East River Bank, 3 Bosworth R.*, 124.)

For this reason the prayer of the petition must be denied. The respondent is entitled to have the contract of sale canceled, and to be repaid the money which he has advanced on account of the purchase.

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SUPREME COURT.

NELSON S. BUTLER and others agt. O. C. LEE and others.

This court has no power to order a *draft*, upon which the action is brought, to be delivered to defendants, for the purpose of being annexed to a commission to be inspected by defendants' witnesses residing out of the state.

THIS is an appeal from so much of an order made at special term, by Justice DAVIES, as requires the original *draft or bill of exchange*, on which the action was brought, to be annexed to the commission to examine certain witnesses in Iowa for the defendants, the draft or bill of exchange to be delivered by the plaintiffs, or their attorney, to the clerk of this court for that purpose, who shall, before annexing the draft to the commissioner, cause a *photograph* of said draft to be taken, at the expense of the defendants,

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to be allowed them as disbursements in the action in case of their recovery.

The defence set up in the answer is, that the draft was in fact drawn for \$10, and was afterwards altered, without the defendants' knowledge or consent, to \$100.

MILLER, PEET & NICHOLS, for plaintiffs.

AMOS K. HADLEY, for defendants.

SUTHERLAND, Justice. We think that part of the order at special term appealed from, should be reversed, with ten dollars costs. We find neither precedent nor principle authorizing that part of the order. (19 *N. Y. R.*, 9; 1 *Duer*, 652; 1 *Kern.*, 575; 3 *R. S.*, 293.)

The Code (§ 388) and the Revised Statutes have prescribed a mode in which the defendants and their witnesses can have an inspection of the draft, if necessary, here, and within the jurisdiction of this court; but we see no power in the court to compel the plaintiffs' to part with their property (the draft) in the manner and for the purposes contemplated by this order.

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SUPREME COURT.

SYRACUSE CITY BANK agt. CORYDON COVILLE and others.

THE ONONDAGA BANK agt. THE SAME.

In an action upon a *money bond*, payable in *instalments*, where there is only one *instalment* due, and the plaintiff, before judgment, issues and seizes by *attachment* the personal property of the defendant, his *lien* by the attachment as against other creditors acquiring an intermediate title or *lien* upon the property, is only to the extent of the amount *actually due upon the bond at the time of the service of the attachment*, although at the time of entering judgment another *instalment* has become due.

That is, the attachment is not a *lien* for future *instalments*, to the detriment of other creditors who have *liens* intervening.

And this is so, assuming that the practice remains the same as before the Code (of which there is considerable *doubt*), of giving judgment on *penal bonds*.

Syracuse Special Term, April, 1860.

THE Syracuse City Bank asks that the sheriff of the county of Onondaga be directed to pay to it certain moneys in his hands, the avails of certain property of the defendants in the above actions sold by him, and which moneys are claimed by the Onondaga Bank.

The facts are briefly these: The action of the Syracuse City Bank was commenced May 18, 1858, on a bond in the penalty of \$13,000, conditioned for the payment of \$6,500, in *instalments* of \$722.22 each, one of which became due May 1, 1858, and another became due on the 15th of September, and before the recovery of the judgment in the action, and after the sale of the property by the sheriff. On the 6th of July, 1858, an attachment was issued in the action, and on the 9th of the same month was levied upon the property of the defendants by the sheriff of Onondaga county, and on the 15th of December, 1858, judgment was recovered in the action for the penalty of the bond, \$1,300 of debt, and \$137.06 damages and costs, with direction that execution issue for the last amount, together with

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\$1,806.58, being the amount of the two instalments which had become due in May and September. On the 16th of December, 1858, an execution upon said judgment was issued to the sheriff of Onondaga, with directions to collect \$1,943.64 and interest, and on the 3d of January, 1859, another execution, issued to the same sheriff, commanding him to levy \$722.22 and interest, for another instalment that had become due on the bond on the 1st day of January.

On the 16th day of July, 1858, the Onondaga Bank recovered judgment against the same defendants for \$2,363.41, and on the same day issued an execution thereon to the same sheriff, who levied upon the same property which he had before attached at the suit of the Syracuse City Bank. The property was sold by the sheriff on the 24th of August, 1858, and the proceeds of the sale were \$2,932.71.

The property, after the levy and seizure by the sheriff, was claimed by one Price, as the assignee of the judgment debtors, and he brought an action of replevin against the sheriff on the 24th July, 1858; but the sheriff gave the requisite bond, the Syracuse City Bank furnishing the security, and retained the possession of the property. The suit was defended by the sheriff, under the attachment of the Syracuse City Bank and the execution of the Onondaga Bank, and the sheriff prevailed in the action, the assignment to Price being adjudged fraudulent as against creditors.

HOUGH & EDWARDS, and W. J. HOUGH, for the Syracuse City Bank.

JOHN C. HUNT and D. PRATT, for the Onondaga Bank.

W. F. ALLEN, Justice. The question before me does not necessarily involve the regularity of the practice adopted by the Syracuse City Bank in taking judgment, in form, for the penalty, with authority to issue execution for the amount of the instalments actually due by the condition

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of the bond. The bond being conditioned for the payment absolutely of a sum certain, in instalments, at specified times; it was not, before the Code, a case for the assignment of breaches and assessment of damages, under the statute regulating proceedings on bonds for the performance of covenants. (2 R. S., 378.) The plaintiff counted in debt upon the bond, claiming the penalty as the debt due, and as the court could see whether the time for the payment of any or all of the instalments had elapsed, it was not necessary to aver the fact by way of assignment of breaches. Upon payment or satisfaction of the amounts due at the time of the recovery, the judgment remained as security for future instalments, and upon the non-payment of the sums as they became due, the plaintiff was at liberty to issue execution for instalments as they became due, upon peril of being set right upon motion, if he issued it improperly, or for too large an amount. (*Wood agt. Wood*, 3 W. R., 454; *Nelson agt. Bostwick*, 5 Hill, 37; *Spaulding agt. Millard*, 17 W. R., 331; *Taft agt. Brewster*, 9 J. R., 334; *Mayor of Albany agt. Evertson*, 1 Cow., 36.)

The statute (2 R. S., 378) made it necessary in actions upon bonds for the breach of any condition, other than for the payment of money, to assign breaches in the declaration, and provided for the trial of the issues that should be joined therein, and for the assessment of the damages occasioned by such breaches, and upon a verdict for the plaintiff, or upon a default of the defendant, authorized judgment for the penalty of the bond in favor of the plaintiff, and that he have execution for the damages assessed, with costs. It also provided, by section 11, that if the amount of the damages and costs should be collected or paid, the real and personal estate and body of the defendant should be exonerated and discharged from any further liability for the damages so assessed; but the judgment rendered in such action should remain as a security for any damages that might be sustained thereafter by the further breach of

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any condition of such bond. A *scire facias* was given to the plaintiff upon the judgment, suggesting such further breaches against the defendant and all parties bound thereby, to which the defendant might plead, and upon which proceedings might be taken to assess the damages for such further breach. (*Id.*, §§ 12, 13.) It necessarily followed, from the form of the proceeding and judgment, that the costs were regulated by the recovery, which was for the penalty. (*Fairlee* agt. *Lawson*, 5 *Cow.*, 424; *Pearson* agt. *Bailey*, 10 *J. R.*, 229; *Godfrey* agt. *Van Cott*, 13 *id.*, 345; *Harris* agt. *Hardy*, 3 *Hill*, 393; *Harvey* agt. *Bardwell*, 6 *Cow.*, 57.) It is not necessary to consider whether this practice, which grew out of the technicalities of the common law, and the form of the contract, has survived the form of actions and of pleadings abolished by the Code, and remains almost alone an exception to the "uniform course of procedure" established by that act. It is certainly not in harmony with all the provisions of the Code, and yet perhaps not entirely repugnant to it, so that the two may not stand together. But considering that the statute regulating proceedings on bonds for the performance of covenants is not repealed by the Code, actions upon money bonds like this are not, as we have seen, within that act, and therefore the former practice upon such bonds is not protected by any statute, and if it continues it is in force by reason of its peculiar and inherent fitness and adaptedness to the remedy to which parties are entitled upon such a contract. The Code, abolishing all forms of actions, requires the plaintiff to insert in his summons in an action arising upon contract for the recovery of money only, a notice that he will take judgment for a sum specified therein. (*Code*, § 129.) Should the plaintiff in an action on a penal bond, conditioned for the payment of money, claim judgment for the penalty, or only for the amount actually due, which is really the cause of action and the extent of his demand? In his complaint he must state plainly and concisely the facts constituting

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the cause of action, and a demand of the relief to which he is entitled. (*Code*, § 141.) The execution must refer to the judgment, and state in the body of it the amount actually due thereon. (*Code*, § 289). And writs of *scire facias* are abolished, and the remedies heretofore obtainable by it may now be obtained by civil actions under the provisions of the Code: (*Code*, § 428.) It would certainly be consistent with the theory and provisions of the Code to hold the party to the same form of proceedings and judgment in all cases in actions on bonds, conditioned for the payment of money, or the performance of covenants that is prescribed in justices courts upon bonds for the payment of money (*Code*, § 53), or in this court, where the amount claimed to be due is reduced by set-off or counter claim (*Alendorf* agt. *Stickle*, 2 *Cow.*, 412; *Fairlie* agt. *Lawson*, *supra*), in analogy to the statute allowing set-off of demands founded upon a bond having a penalty for the sum equitably due by the condition (2 *R. S.*, 354, § 18), and allow successive actions to be brought as causes of action arise from time to time for breaches of the condition.

The English common law procedure act of 1852, in terms, excepted the act regulating the assignment of breaches, and authorizing a judgment for a penalty as a security for damages in respect of further breaches from the effect of the "procedure act." (*Act*, § 96.) But it is not necessary to decide this question. Assuming without expressing an opinion, that the practice remains the same as before the Code, and that judgment in the same form should be given on bonds having a penalty; but little advance is made in establishing the claim of the Syracuse City Bank to the moneys in the sheriff's hands, beyond the amount actually due at the time of the service of the attachment. The lien of that bank is that given by the attachment, the judgment merely declaring and settling the rights of the parties, and confirming and establishing the lien of the attachment. In this sense, and to this extent, the lien of

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the judgment, or rather the lien of the execution issued upon the judgment, for the judgment itself is not a lien upon chattels, relates to and dates from the time the property was attached. (*Am. Ex. Bank agt. Morris Canal and Banking Co.*, 6 *Hill*, 362.) It is said that the lien of the attachment is limited to the amount for which the court commanded the officer to attach; but it is commensurate with the amount of the judgment and costs, though that be greater than the amount which the precept of the writ required the officer to secure, and to this is cited *Drake on Attachments* (§ 223). This may be true, yet I apprehend that as against junior attachments or executions, the lien of the attachment must be restricted to the cause of action for which the writ issued, and cannot be so extended as to embrace new and distinct causes of action, and include claims for which the plaintiff could not have proceeded before the lien of the subsequent process attached. I know no such system of tacking in judicial proceedings. The cause of action is the breach of the condition, and a new cause arises upon every neglect to pay an instalment as it becomes due. The claim, on demand of the plaintiff in law and equity, is limited to the amount actually due, without regard to the form of the action or of the judgment. Whenever breaches are required to be assigned in a declaration, or suggested upon the record (and the proceedings upon money bonds are analogous to such actions); if breaches take place after action brought, and before judgment, the plaintiff cannot assign or suggest them, he must bring a *scire facias* (2 *Ch. Arch.*, 943). So having taken measures to recover one instalment by an attachment, if another become due before he is in a situation to issue an execution upon a judgment for the penalty, the plaintiff must obtain a second attachment. The rights of creditors by judgment and execution junior to the first attachment are not liable to be thrust out by the tacking of a new cause of action, and a new claim to the pre-existing

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cause and claim. If that should be so, then in case the first instalment is paid after the second becomes due, where then is the lien for the benefit of the last instalment? Or suppose, on the trial of the issue as to the first instalment, it should be wiped out by a set-off, where then would be the action and the lien for the default in paying the second instalment. So far as the lien is concerned, there is and can be no connection between the two instalments. If the action were a bailable action, or if for any reason the defendants were liable to be held to bail, they could only have been held to bail for the principal and interest due on it, and not for the penalty. So on bonds for the performance of covenants, bail can only be required to the amount of the real damages sustained, and not to the amount of the penalty. (*Ch. Arch.*, 685; *Talbert agt. Hodson*, 7 *Taunt.*, 251; 1 *Sid.*, 63; *Anderson agt. Bill*, 2 *C. & J.*, 630; *Gr. Pr.*, 138.) Bail being required only for the amount actually due at the time of the commencement of the action, it would hardly be claimed that the liability of the special bail would increase, as instalments became due from time to time, or breaches of the condition of the bond occurred up to the time judgment should be recovered. The goods seized upon the attachment are in the place of bail or security for the debt, and as creditors, by seizure, acquire an interest in or a lien upon the goods, they have all the rights and equities of special bail, and the lien of the attaching creditor cannot be increased to their detriment by tacking a claim accruing after the creditors have acquired their rights. The object of an attachment is to secure a debt actually due, and has no reference to a judgment which may, according to the practice of the court, be recovered as a security for a debt thereafter to become due. To warrant an attachment it must appear that a cause of action exists, and this cause is only for a sum actually due. (*Code*, § 229.) The statute prescribes the form of the attachment, and in it must be stated the amount of the plaintiff's demand, and

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the sheriff is commanded to attach and safely keep all the property of the defendant, or so much thereof as may be sufficient to satisfy the demand. (*Id.*, § 231.) If a sheriff neglect to levy on sufficient property to satisfy the debt, he is liable to an action at the suit of the plaintiff. (*Ransom agt. Halcott*, 9 *How.*, 119.) But a sheriff would not be liable to an action for not levying on property to satisfy instalments that should thereafter become due, or the entire penalty of the bond, and would be liable to an action for an unreasonable levy, if he should do so; and the plaintiff can claim no more, under his attachment, than he could have compelled the sheriff to take and hold. At any time after appearing in the action, the defendant may apply for an order to discharge his attachment, and if the order be granted, the property attached will be returned to him. Upon such application the defendant must deliver to the officer an undertaking, with sureties, to pay the plaintiff the amount of judgment that may be recovered against the defendant in the action, not exceeding the sum specified in the undertaking, which shall be at least double the amount claimed by the plaintiff in his complaint. (*Code*, §§ 240, 241.) The amount of the plaintiff's debt due at the time, and claimed by him, determines the amount for which security must be given on the discharge of the attachment. This is in analogy to the rule as to bail to the action on a money bond with a penalty. The bail in each case has reference to the amount actually due, the cause of action as it exists at the time, and not to any prospective liability. It is true the Code directs that the judgment shall be satisfied out of the attached property. (*Code*, § 237.) But this section is to have a reasonable construction. The judgment is not a lien upon chattels, and the execution upon it cannot supersede a prior levy by virtue of other process, and the attachment cannot operate prospectively, or become by a sort of sliding process, security for debts as they accrue. As against the judgment debtor, the property may be

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applied to satisfy the whole judgment, and this not in virtue of the attachment, but under the execution or the judgment of the court. Intervening rights and equities are not expressly reserved, because it was not necessary. The sheriff, for any neglect of duty under the attachment, would only be liable to the amount of the claim for which the attachment issued and the costs. Had a wrong doer taken the property from the possession of the sheriff by the assent of the debtor and general owner of the property, his liability would have been limited by the extent of the sheriff's lien under the attachment. It is simply the case of one creditor obtaining a lien for a single debt, leaving an interest in the debtor subject to levy and sale, and the seizure of such interest by a second creditor, and this lien must prevail against a demand of the first creditor thereafter maturing. The sale of the property in this case was in truth in virtue of the execution of the Onondaga Bank, as the sheriff had no authority to sell under the attachment, and the sale was before the second instalment became due, and before any lien could attach in respect to it. Whatever virtue and force there may be in a judgment for the penalty of a bond to secure upon the real property of the debtor, the payment of instalments thereafter to become due, there is none in an attachment issued under the statute, to become effectual as a security upon the chattels of the debtor for future breaches of the conditions of the bond, or the payment of instalments thereafter to become due as against creditors or others acquiring an intermediate title to or lien upon the goods. The Syracuse City Bank is only entitled to the instalments due at the time the attachment was issued, with interest and cost, and the Onondaga Bank is entitled to the residue.

The sheriff will be directed to apply the money accordingly. Neither party to have costs of this motion.

Affirmed on appeal to the general term of the fifth judicial district. July 6, 1860.

Panton agt. Zebley.

NEW YORK SUPERIOR COURT.

JOHN A. PANTON agt. JOHN F. ZEBLEY.

Under an order for the delivery of property to a receiver, the party ordered to make the same is not bound to deliver the property to any person but the receiver *personally*.

Where an order is made directing the delivery of property to a receiver, an attachment for contempt will not issue, because the defendant refuses a demand made by the plaintiff, his attorney, or the referee appointed to see that the delivery is made.

A demand, in such case, must be made by the receiver *personally*; and, it seems, the attorney for the plaintiff cannot act for the receiver as his attorney.

New York Special Term, July, 1860.

AN order was entered, June 14, 1860, directing the defendant to deliver certain notes held by him, as trustee, to a receiver appointed previously in the action, and it was referred to a referee to summon the parties before him and direct the delivery to be made. The parties being summoned appeared before the referee, the receiver being absent, when the defendant was directed by the referee to deliver over the notes to the plaintiff's attorney, or to himself, which the defendant refused to do. On the certificate of the referee, that the defendant had disobeyed the order of the court, an attachment was granted against him, on the return of which the foregoing facts appeared.

F. N. BANGS, *for plaintiff.*

ANDREWS, COLBY & THOMPSON, and J. W. EDMONDS, *for defendant.*

WOODRUFF, Justice. An examination of the papers satisfies me that the defendant cannot be punished under the present attachment, except for a violation of the order of June 14th, 1860; and as to that I am constrained to say that the defendant was not bound by the order, and could not be required by the referee to deliver the note of George

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A. Leavitt & Co. to the plaintiff, nor his attorney, nor to the referee; and as the receiver was not present, and has not, since the order was made, demanded the note, the defendant has not, in strictness, refused to comply with the order, and cannot therefore be punished for the alleged contempt in disobeying it. The plaintiff will be put to the necessity of a further demand on the defendant, or a further reference for the proper execution of the order.

But as the conduct of the defendant, as appears upon the papers submitted, is in gross disregard of the rights of the plaintiff, in substantial disregard of the orders of the court, and evinces a determined purpose to evade its orders, and hinder and embarrass the plaintiff in the prosecution of his claims, I cannot order the payment to him of any costs.

Attachment discharged, without costs.

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SUPREME COURT.

ENOS C. BROOKS and others agt. RICHARD B. STONE and others.

Where a plaintiff is an *attaching creditor* of real estate in an action for money due on a bond, he cannot sustain an action to set aside an alleged fraudulent judgment of confession previously made by the defendant, and have an injunction to restrain the sale of the attached property under and by virtue of such alleged fraudulent judgment.

The plaintiffs' complaint in such case does not show that he is entitled to the relief demanded, as it does not show that he is a *judgment creditor*, and his remedy at law exhausted—*non constat*, that he will ever get a judgment.

And for the same reason the defendant is not doing, or threatening to do, some act during the litigation in violation of the plaintiffs' rights, respecting the *subject of the action*; because it does not, nor cannot appear what the plaintiffs' rights are, until established by a *judgment*; and besides the property attached is not the *subject of the action*.

Erie General Term, May, 1860.

Present, MARVIN, DAVIS and GROVER, Justices.

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APPEAL from an order vacating an injunction order. It is alleged in the complaint, in substance, that the defendant, Richard B. Stone, in January, 1858, for the purpose of defrauding his creditors, and particularly the plaintiffs, fraudulently and without consideration confessed a judgment to his brother, George B. Stone, for \$1,354.19. That the plaintiffs, in March, commenced an action in this court against Richard B., for the recovery of money due on a bond, and caused an attachment to be issued in the action, and attached certain real estate of Richard B., and filed a *lis pendens*, and that after this, an execution was issued upon the fraudulent judgment, and the real estate so attached was advertised for sale upon such judgment and execution.

This action was then brought to set aside the judgment, and an injunction order was obtained restraining a sale by virtue of the judgment and execution. Affidavits were used with the complaint for the purpose of obtaining the injunction order.

A. G. RICE, for the plaintiffs.

CARY & WHITE, for the defendants.

By the court, MARVIN, Justice. The rule, prior to the Code, was well settled that a creditor could not restrain the debtor from disposing of his property until he had exhausted his remedy at law by judgment and execution. It was expressly held that an attaching creditor, under the absent debtor act, could not move to set aside a judgment alleged to have been fraudulently confessed, until trustees were appointed. (*Fort agt. Fort*, 9 W., 442). In *Wintringham agt. Wintringham* (20 J. R., 296) the court refused to set aside a judgment confessed, or to stay execution, on the ground of fraud, at the instance of a creditor at large, whose debt had not been legally ascertained by judgment. In *Reubens agt. Joel* (3 Kern., 488) it is, however, supposed

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that the Code has so modified this rule as to embrace this case (§ 219).

An injunction order may be made when it shall appear by the complaint that the plaintiff is entitled to the relief demanded, and such relief, or any part thereof, consists in restraining the commission or continuance of some act, the commission or continuance of which, during the litigation, would produce injury to the plaintiff. Is the case embraced by this clause of the statute? In other words, has this provision of the statute changed the pre-existing rule touching the character of the evidence to be produced to entitle the plaintiff to call in question the acts of the debtor relating to his property? I think it has not. The complaint does not show that the plaintiff is entitled to the relief demanded, as it does not show that he is a judgment creditor, and until he shows himself a judgment creditor, he has no right to call in question the judgment which George B. Stone has against Richard B. Stone. It may be that he will not be able to recover a judgment, or if he does, perhaps Richard B. Stone will pay it. In either case this action will be useless, unnecessary. The law has clearly settled the question, under what circumstances a plaintiff is entitled to the relief demanded in this case, and it is when he comes as a judgment creditor, his remedy at law having been exhausted. I think *Reubens agt. Joel* is, in principle, in point. The circumstances are not precisely the same. But in that case, the plaintiff was, as alleged, a creditor at large, and complained of an assignment by his debtors to defraud creditors, and sought to set it aside. The act complained of was past, though it is also alleged in the complaint, that a portion of the property assigned was about to be disposed of and sold, and an injunction was demanded as a part of the relief, to restrain the defendant from selling or disposing of the assigned property. Upon a demurrer to the complaint, judgment was for the defendant, and affirmed in the court of appeals.

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By the next clause, in section 219, when during the litigation it shall appear that the defendant is doing, or threatens to do, or procure, or suffer some act to be done in violation of the plaintiff's rights respecting the subject of the action, and tending to render the judgment ineffectual, a temporary injunction may be granted to restrain such act. I think this provision not applicable to the case. It does not, as already remarked, appear that the defendants are doing, &c., any act in violation of the plaintiffs' rights. It cannot appear that his rights are in danger of being violated, until his rights are established by a judgment. Besides, this provision relates to some right respecting the *subject of the action*. The real estate attached, in this case, is not the *subject of the action*. This provision is applicable to cases when there is danger that the subject of the action may be injured or destroyed: as when a mortgagee is foreclosing his mortgage upon premises that are, or may be, an inadequate security, unless the mortgagor or occupant of the premises is restrained, during the pendency of the litigation, from committing waste. I think the order appealed from should be affirmed with ten dollars' cost.

SUPREME COURT.

GEORGE S. COE agt. ALONZO L. BECKWITH and others.

In order for a *trustee* appointed by a railroad company to *derive title*, under the *trust deed*, to the funds arising from the tolls and income of the road, he must take possession of the road and run it.

But where such funds have been deposited by the railroad company with a trust company, to the *credit of the trustee*, with the avowed intent and purpose of meeting the coupons then actually due, to the bondholders of the road, and the taking possession and control of such funds by the trustee, with notice of the object of the deposit given to the trust company, it constitutes an *appropriation* of the funds; and invests the *title thereto in the trustee* for the purpose specified.

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Where it does not appear that the officers of the railroad company had not authority to make such deposits, the authority will be presumed; because the act, without authority, would constitute a *breach of trust*; and courts never assume a breach of trust to have been committed.

The trustee in such case has a right to apply to the court for *instructions*, where conflicting claims to the funds on deposit are made by the bondholders upon their coupons due and unpaid.

On such application it is not necessary to make the railroad company, nor the trust company, *parties*; nor is it necessary that the *sheriff* who served an attachment upon the funds in favor of a bondholder, should be made a party; and where all the holders of coupons are *numerous* and *unknown*, it is a sufficient reason for not making them parties.

A *demurrer* by a defendant, which names others who are holders of coupons, who have not been joined as defendants, is irregular, as assuming the functions of a *plea in abatement*.

New York Special Term, April, 1860.

THE defendant, Beckwith, demurred to the complaint in this action. The facts will fully appear in the opinion of the court.

F. E. MATHER, *for defendant, Beckwith.*

F. A. LANE, *for plaintiff.*

LEONARD, Justice. The plaintiff alleges that he is a trustee, under a trust deed from the Cleveland, Zanesville and Cincinnati Railroad Company, conveying the track equipments, tolls and income of the road, to secure the holders of the first mortgage bonds of the road, amounting to \$500,000, and is authorized thereby to take possession of the road and equipments, carry it on, and apply the proceeds to the payment of the bondholders, after deducting expenses, in case the company make default in paying the coupons, &c., as they become due, for the period of sixty days, after demand by the bondholders.

That none of the coupons have been paid by the company since 1856.

That the plaintiff, under the trust deed, took possession of the tolls and income, and the same were deposited in the United States Trust Company to the credit of "George S. Coe, trustee."

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The complaint sets forth a letter to the trust company from the president of the said railroad company, dated February 19th, 1858, informing the trust company, that all funds thereafter remitted by the railroad company "are to be deposited to the credit of George S. Coe, trustee of our first mortgage bonds, for the purpose of paying the coupons on our bonds secured thereby."

The railroad company had previously deposited funds in the trust company, since the railroad company had ceased paying coupons at maturity, to the credit of the plaintiff as trustee, and Beckwith had been paid some \$453 on coupons then over due.

The complaint states that various sums have since been deposited in the trust company to the credit of "George S. Coe, trustee," which the plaintiff took possession of under the said deed, and were intended to meet those coupons of the railroad company on these bonds due in 1856.

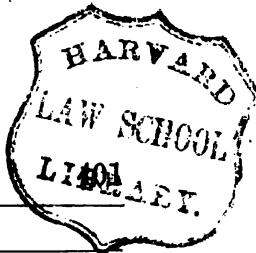
That an attachment has been granted by this court in an action brought by Beckwith against the railroad company, on coupons of the first mortgage bonds due in 1856, 1857, 1858 and 1859, amounting to \$9,520, directed to the sheriff of this city, who has served it on the trust company and on the plaintiff, accompanied by a special notice that Beckwith claims that the attachment covers funds mentioned in the letter of 19th February, 1858.

That Beckwith claims to hold the funds now on deposit in the trust company, to the credit of the plaintiff as aforesaid, by virtue of the said attachment.

That the holders of the coupons are numerous, and unknown to the plaintiff, and it is impracticable to make all the holders thereof parties.

Four parties, who are holders of a large amount of these coupons, are made defendants, and they have made demand on the plaintiff for payment out of the funds so deposited to his credit in the trust company.

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The plaintiff alleges that he apprehends that he will be involved in some personal liabilities, if he should pay the one or the other of these claimants, and he demands the instructions of the court as to who is entitled to the funds standing to his credit, as trustee, in the manner above mentioned.

The defendant, as one of his grounds of demurrer, insists that the complaint does not state facts sufficient to constitute a cause of action.

It is necessary, then, to ascertain whether the plaintiff has any title to these funds as a trustee: if he has such title, he is entitled to apply to this court for instructions as to his conduct in relation to the trust, when questions of difficulty arise, and in that event, also, the defendant will have acquired no lien upon the funds in question, by virtue of his attachment.

In my opinion, the complaint fails to make title in the plaintiff to the fund in question by virtue of the trust deed.

In order to derive title under this deed, it is necessary that the plaintiff take possession of the railroad, and run it, whereby, he would be entitled to the tolls and income, and after paying expenses, could divide them among the bondholders. The complaint does not, however, allege that the plaintiff has taken possession of the road, or run it. The funds have been deposited to his credit in the trust company, as trustee, but he did not acquire them in any manner by virtue of any power or authority under the trust deed. The complaint does not show that any one was under any legal liability to deposit those funds to the credit of the plaintiff any more than to the credit of another person. The position which he held rendered him a very proper person to be chosen for the purpose of receiving and paying out the funds, but there is nothing to show his right to compel any person to account to him for the earnings of the road. The plaintiff could acquire

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that right under the deed, only by taking possession of the railroad.

True, the complaint alleges that he has taken possession of the tolls and income, but how did he do it? That has not been disclosed.

The money in question may have been taken possession of by being deposited to the plaintiff's credit, and that is all that this allegation (from the other facts stated) can mean in this case.

The allegation that the plaintiff took possession of this money by virtue of the deed, is merely a mental deduction or conclusion, without any facts stated upon which any one else can arrive at the same result.

It is stated in the complaint, that an officer of the railroad company, visited the east after the company were in default for the non-payment of coupons, for the purpose of making an arrangement with the bondholders, but it is not alleged that any arrangement was in fact effected, or that any change was made in the trust, or in the manner of securing the payment of the bonds or coupons, or anything from which the plaintiff derives title to the funds in question.

The plaintiff must stand, so far as the complaint is concerned, upon the appropriation made by the letter of February 19th, 1858, and the actual deposit made in pursuance thereof. The complaint does not state, expressly, that the railroad company deposited the funds in question, but from the whole tenor it is fairly to be inferred. If not deposited by the railroad company, then none of the defendants have any interest therein.

The allegation is, that *there has been deposited* various sums in the trust company to the credit of George S. Coe, trustee, but who made the deposits, or from what source derived, is not definitely stated.

It is then alleged that the plaintiff took possession of them under the trust deed. That he took possession is

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probable; but that he did so under the deed is impossible, from the evidence of any fact alleged. The complaint, then alleges that the funds so deposited were intended to meet the coupons which fell due in 1856. This latter averment is pregnant with meaning, and is probably the saving fact in the complaint.

I am of opinion that the allegations of the purpose for which the deposits were made; of the taking possession thereof by the plaintiff; of the letter of February 19th, 1858, apprising the trust company of the account and purpose for which the future deposits of the railroad company were to be made, constitute an appropriation of the funds; and that the plaintiff was invested thereby with the title thereto, as trustee, for the holders of the coupons, who had an immediate right therein, and could enforce a pro rata division thereof on demand, and was not invested therewith, as agent, only for the railroad company. The railroad company cannot control or reclaim the deposits. As to them, the deposits are appropriated. The trust company would be liable to the plaintiff, in a suit on behalf of the holders of the coupons, if they should suffer these deposits to be withdrawn on the authority of the railroad company alone.

The objection of the want of authority in the officers of the railroad company to make those deposits in the manner they did, is not tenable, inasmuch as if deposited without authority, the act would constitute a breach of trust. It does not appear that the officers had not the authority.

Courts never assume a breach of trust to have been committed. Authority to make the deposits must be presumed.

The objection, for the want of proper parties, is not, I think, well taken.

I. The railroad company have fully parted with all title to the money, and have dedicated it to the holders of the coupons.

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II. The plaintiff's check will afford a good discharge to the trust company, and the coupons which he retains he will then hold as the trustee or agent of the railroad company. Therefore neither the trust nor railroad companies are necessary parties.

III. The sheriff has no interest at present. The fund is not in his possession or control.

IV. The plaintiff's excuse for not joining all the holders of coupons, is well recognized and sufficient, viz., that they are numerous and unknown.

The demurrer is irregular in naming others who are holders of such coupons who have not been joined as defendants. It assumes the functions of a plea in abatement.

No conclusion is to be drawn therefrom adverse to the plaintiff, as such statements are not within the office of a demurrer.

The defendant, Beckwith, is one of the same class of coupon holders as the other defendants, and entitled to participate with them pro rata only, and it would be wholly unjust and inequitable for him to obtain the whole fund, or more than his share, by a common law action upon his coupons. At least, it so appears from the allegations of the complaint.

Judgment must be for the plaintiff on the demurrer, with leave to the defendant to answer the complaint in twenty days. The costs of the demurrer are to abide the event of the action.

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SUPREME COURT.

JOHN MOORE agt. LOFTIS WOOD.

The statute authorizes an *appeal* from the city court of Brooklyn to the supreme court, "from any judgment or final determination of said city court, and from any *intermediate order* involving the merits and necessarily affecting the *judgment*."

The question is, will an appeal lie upon such an order made *before judgment*?

Held, that it will, consequently where the judge of the city court made an order setting aside a verdict, and ordering a new trial, and an appeal taken from such order before judgment; *Held*, reviewable in this court.

A party cannot move to set aside a *verdict* in his own favor, on the ground that the *damages* found by the jury were *too small*, or in other words, on the ground that the evidence was insufficient to sustain the verdict. His remedy is by a motion for new trial upon a *case*.

Dutchess General Term, May, 1860

Present, LOTT, EMOTT and BROWN, Justices.

THIS case comes to us by an appeal from an order made by the judge of the city court of Brooklyn, setting aside a verdict and ordering a new trial. No judgment has yet been rendered in the court below, and the counsel for the respondent makes the objection that an appeal will not lie to this court from an order made before judgment.

By the court, EMOTT, Justice. Section 6 of the act establishing the city court of Brooklyn, as amended in 1850 (*Laws of 1849, ch. 125, p. 170; Laws of 1850, p. 148*), authorizes an appeal to this court "from any judgment or final determination of said city court, and from any *intermediate order* involving the merits, and necessarily affecting the *judgment*." It is conceded that the order now appealed from is one which involves the merits, and will necessarily affect the judgment; but it is contended that the section does not give a direct appeal from such orders, but was only intended to confer upon the appellate court the right to review these *intermediate proceedings* upon an appeal from

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the final judgment. This construction is founded mainly upon the use of the word "and," as the copula between the two branches of the section, and upon the language "necessarily affecting the judgment," which it is contended implies that the judgment must have been already entered before the appeal can be taken.

We are of opinion that such an inference cannot properly be drawn from the language of this section, but from it, as well as from other parts of the Code of Procedure, either directly affecting such cases or regulating appeals in general, it is clear that this appeal is properly brought. The argument of the defendant's counsel is, that if the legislature had intended, by this section, to authorize appeals directly from orders as well as from judgments, they would have made use of the disjunctive "or" between the two clauses of the section, so that it would read, "from any judgment, &c., or from any order, &c." But this section is an enumeration of the cases, in which jurisdiction is conferred upon this court to entertain appeals from the city court, and of different classes and kinds of proceedings in the latter tribunal from which such appeals will lie. It is an enumeration in which final judgments and intermediate orders are connected, things of a different nature, and not varieties of the same proceeding. There seems to us to be no reason why the word "and" may not properly be used to connect and accumulate the various kinds of determinations and proceedings of the inferior court, which the appellate court is instructed to review. It is not the case of various proceedings or determinations of the same essential nature and class, which would therefore require the use of a disjunctive conjunction to distribute them into subdivisions and classes, in order to give a right of appeal from each. If the statute were speaking of orders only, and used the word "and" to connect the successive clauses of description which it contained, it might be a fair construction, according to the legitimate rules of legal hermeneutics, to

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hold that these clauses indicated so many additional characteristics, which must all be found in the subject to which the statute referred, before it could come within its views. Thus, in the very section before us, an appeal is allowed from an order "involving the merits, and necessarily affecting the judgment;" and the use of the word *and* instead of *or* shows clearly that the legislature intended that an order, to be appealable, must both involve the merits and affect the judgment. In order to distribute the term order, the disjunctive "or" would in strictness have been necessary. Even this rule, however, cannot always be applied to the present legislation of the state. For example, in the second subdivision of section 11 of the Code, as amended in 1857, which applies exclusively to appeals to the court of appeals from one kind of determination made by inferior courts, to wit, orders, jurisdiction is given to review "every determination made by such courts in an order affecting a substantial right, when such order, in effect, determines the action and prevents a judgment, from which an appeal might be taken, and when such order grants a new trial." Here an entirely new subdivision of orders is introduced, and a new jurisdiction given to review them, by the use of the copulative conjunction in the statute. The residue of this section, as amended, is taken up with provisions relating to the new class of appeals respectively, and it has never been supposed that the effect of the amendment has been to add to the requisites which must previously have been found in every appealable order, that it must also grant a new trial. It is enough, however, for the present purpose to say that in a statute containing an enumeration of subjects, the use of a disjunctive conjunction is not necessary to distribute these subjects where they are of different natures and characters. The word "and" was properly used in the section we are now construing to add to and increase the different kinds of determinations made by the city court, which we are authorized to review.

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There are one or two other considerations which make this exceedingly plain. There is a striking difference between the phraseology of this section and that regulating appeals to the court of appeals. Upon the construction contended for by the plaintiff's counsel, we obtain by this statute merely the power upon an appeal from a judgment, to review an intermediate order of the character here described, the same power possessed in that respect by the court of appeals in reviewing the proceedings of subordinate tribunals. But in the case of appeals to that court, the language of the statute is, that they shall have jurisdiction to review a final determination of an inferior court made "*in a judgment, &c.*, and upon the appeal from such judgment to review any intermediate order, &c." This language is plain, and this subdivision in the section gives no right of appeal from orders. But it is very different from the language employed in the statute now under examination. The connection between the different clauses of section 6 of the city court act, is more like that between the three subdivisions of section 11 of the Code, and the phraseology employed in the 1st subdivision of the latter section, only serves to strengthen the construction we adopt. Again, by section 329 of the Code, it is enacted that "upon an appeal from a judgment, the court may review any intermediate order involving the merits, and necessarily affecting the judgment." This is applicable to all classes of appeals, and, among others, to appeals from the city court, and it obviously rendered the second clause of the section under consideration unnecessary, if its only effect would be to authorize or require the examination of orders of this description when the case came up on appeal from the final judgment.

As to the criticism upon the words "necessarily affecting the judgment," it is sufficient to say that these words must be construed with reference to the residue of the section. They are fairly susceptible of a construction which will

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apply them either to a judgment which has been, or to one which is to be rendered. As the statute distinctly gives a right of appeal from orders before judgment, the qualification which it attaches, that they must affect the judgment, must mean that they will necessarily affect that judgment when it shall be given.

We are of opinion that the appeal in this case was well taken, and that we must consider whether the order appealed from was properly made. Upon this point we are satisfied, by an examination of the papers, that the proceedings in the city court were incorrect, and that the order made by the city judge was one which he had no right to grant.

The action was by a lessee against his lessor, for damages occasioned by a breach of covenants in a lease. The defendant denied the breach, and also set up a counter claim. At the trial the plaintiff had a verdict for six cents damages. He thereupon moved the court to set aside this verdict in his favor. This motion was made upon the minutes of the judge, under § 264 of the Code. It was granted, and an order made setting aside the verdict, and directing a new trial, from which this appeal is taken. The cause of complaint by the plaintiff obviously was in the court below, that the damages found by the jury were too small. There is, indeed, one exception taken by the plaintiff in this case, but it was not well taken, and does not require any notice. The order undoubtedly proceeded upon the insufficiency of the damages. The difficulty is, that the Code does not permit a motion for a new trial for such a cause to be heard upon the judges minutes. It authorizes this mode of reviewing the proceeding at a trial only in three cases, upon exceptions, for insufficient evidence and for excessive damages. By insufficient evidence is intended a case where the verdict is contrary to the evidence, not where the jury have found a verdict upon evidence, but have ignorantly or perversely found too some

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damages. A verdict for excessive damages is in one sense a verdict upon insufficient evidence, but its enumeration in the statute shows that it was not supposed to fall, necessarily or properly, within that class of cases. A verdict upon insufficient evidence, means a verdict for a party upon evidence insufficient to establish his right to recover, and which therefore ought not to stand. A party cannot move to set aside a verdict in his own favor, on the ground that the evidence was insufficient to sustain it. That was this case, and the court below erroneously entertained the motion. The only remedy of the plaintiff was by a motion for a new trial upon a case.

The order appealed from was therefore erroneous, and must be reversed, with costs.



SUPREME COURT.

J. S. DICKINSON and others agt. DARIUS BENHAM and others.

Where, *previous* to an *assignment* for the benefit of creditors, made by the defendants, an *attachment* was issued against their property; *held*, that the defendants, *subsequent* to the assignment, might move to *vacate* the attachment, on the ground that the affidavit upon which it was granted was insufficient.

Affidavits in opposition to a motion to set aside an attachment, are to be received only to explain or contradict affidavits offered by the moving party.

Where the defendants stated that "if the plaintiffs' demand were sued, they would make an assignment; and that they owed a large amount of confidential debts which they should provide for;" *held*, no cause for attachment, on the ground that the defendants were about to dispose of their property with intent to defraud their creditors. The law allows debtors to make assignments for the benefit of their creditors, and to give preferences in payment.

New York Special Term, April, 1860.

MOTION by defendants to vacate and set aside an attachment.

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BONNEY, Justice. On the 14th January, 1860, a warrant of attachment was issued in this action, on allegations that defendants were about to dispose of their property, with intent to defraud their creditors. (*Code*, § 229.)

The defendants, on summons, affidavit and warrant, now move to set aside the attachment, with costs, on the ground that the affidavit does not state facts sufficient to authorize it.

The plaintiffs, as a preliminary objection to the motion, offer to show by affidavit that the defendants, on the 21st of January, 1860, made an assignment of all their property for the benefit of their creditors, giving preferences, and insist that defendants have consequently no present interest in the property attached, and therefore cannot make this motion. I do not think this affidavit can be received, nor, in my opinion, would this objection avail if the supposed fact appeared. The Code (§ 241) gives defendants the right to move to discharge an attachment, *as in the case of other provisional remedies*, and I understand the rule to be as to all provisional remedies, that the persons against whom they are taken may move to vacate them, on the ground that the papers on which they were allowed were insufficient, and that the remedies or process were illegally or improvidently granted.

The authorities on which the plaintiffs rely, at the utmost, only decide that the party against whom an attachment is issued, cannot move its discharge when he had no interest in the property attached at the time when the attachment was issued or levied, which is not this case.

Additional affidavits are also offered by plaintiffs to sustain the attachment ; to the reception of which defendants' counsel objects. I have examined the authorities cited by plaintiffs' counsel to sustain his offer, and following the case of *Wilson agt. Britton* (6 Abbott, 33), hold that affidavits in opposition to a motion to set aside an attachment

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are to be received only to explain or contradict affidavits offered by the moving party.

In this case the motion is made on the original affidavits alone, and consequently no affidavits on the part of the plaintiffs are admissible.

The only facts stated in the original affidavit to sustain the allegation that defendants were about to dispose of their property, with intent to defraud their creditors are, that when defendants were called upon to give security for plaintiffs' demand, or a part of it, they refused, "*And then stated that if the plaintiffs' demand were sued, they would make an assignment; and that they owed a large amount of confidential debts, which they should first provide for.*" The law of this state allows debtors to make an assignment of their property for the benefit of their creditors, and to give preferences in payment; and it appears to me that this statement, fairly construed, amounts only to a declaration, that in case an action was commenced by plaintiffs, the defendants would exercise this legal right; and I cannot consider such declaration any evidence that defendants were about to dispose of their property with intent to defraud creditors.

The case of *Wilson agt. Britton (supra)* is direct authority for this decision.

The motion is granted, with ten dollars costs.

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SUPREME COURT.

GEORGE SCHLEMMER agt. BENJAMIN MYERSTEIN.

Where an attachment has been vacated by the court, after opposition and argument on the merits of the application, another application for the attachment on substantially the same facts, whether before the same or another court, will not be entertained.

The defendant is not to be continually vexed by the same application; nor are the same or different tribunals to hear and decide upon the same matters more than once.

Taaks agt. Schmidt.

New York Special Term, May, 1860.

MOTION by plaintiff for an attachment against the defendant.

LEONARD, Justice. Nothing is shown to have occurred or come to the knowledge of the plaintiff, or his agents, to authorize the granting of an attachment, since he applied for and obtained such a warrant in the marine court. The attachment in that court was vacated after opposition and argument on the merits of the application, on the same state of facts now existing.

The facts have been more fully presented in this court, but they are the same which then existed, and might have been presented with the same care on the hearing of the motion in the marine court. No new case is here presented. The defendant is not to be continually vexed by the same application; nor are the same or different tribunals to hear and decide upon the same matters more than once.

There is also much reason, as I think, to doubt the good faith of the application.

Motion granted. Ten dollars costs of the motion to the defendants, as costs in the action.

SUPREME COURT.

WILLIAM G. TAAKS agt. THEODORE SCHMIDT and others.

A plaintiff is barred from the right of maintaining an action in a state court against *foreign consuls* accredited to this country; and such consuls are not required to answer in chief, in order to procure the benefit of their exemption from suit in a state court.

Where such consuls are joined in an action with other defendants, who are properly sued, and an injunction order inadvertently granted, the plaintiff may discontinue, *without costs*, as to the consuls; but only on payment of costs and damages arising from the injunction as to the other defendants; and not then if they have interposed a counter claim.

Where a referee has reported the facts, and not the damages which the defendants have sustained by reason of an injunction order, the report will not be confirmed.

Taaks agt. Schmidt.

New York Special Term, May, 1860.

MOTION for leave to discontinue, without costs, and to confirm referees report.

LEONARD, Justice. The defendants, John W. Schmidt, Gerhard Jansen and Edward Vonder Heydt, are each consuls of different foreign governments, accredited to this country; and by virtue of their offices the plaintiff is barred from the right of maintaining an action against them in any state court.

It is not necessary to consider how far a state court is bound to exercise its authority to restore a foreign consul to any property or rights, in the possession of which he has been disturbed by the operation of an injunction order inadvertently granted, when the court were ignorant of the fact that he held such office.

In this case these defendants had no manual possession of the property in controversy, and if they had had any when the injunction order was granted, it would have been as agent only for their principal, Theodore Schmidt, who is also a party defendant, and can fully defend or claim his own rights.

The action must be dismissed as to the three defendants who are consuls, without costs to either party as against the other.

They were not required to answer, in chief in order, to procure the benefit of their exemption from suit in a state court.

The order is to be without prejudice to the rights of the defendants.

The plaintiff has a right to dismiss his action as to the other defendants on the usual terms, unless those defendants have interposed a counter claim.

If the plaintiff voluntarily dismisses, it amounts to an admission that he cannot maintain his action, and that the injunction order was improperly asked for and granted.

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When the action is terminated either by a judgment of the court, in favor of the defendants, or by voluntary discontinuance of the plaintiff, a reference to ascertain the damages which the defendants have sustained by reason of the injunction is proper, but not before that. (*Coates agt. Coates*, 1 *Duer*, 664.)

It is reasonable to presume that the order of the 20th June last, directing a reference to ascertain such damages was made, in order to inform the court as to the terms upon which it would be proper to allow the plaintiff to discontinue.

It is quite clear that no sound reason exists for allowing the plaintiff to discontinue as to any of the defendants, except those holding the office of consul, without costs. The motion for leave to discontinue, without costs, as to these defendants is therefore denied. The report of the referee does not conform to the order of reference. He has reported the facts, but not the damages which the defendants have sustained, if any, by reason of the injunction, as the order required. The motion to confirm the report is therefore denied. The costs of the motion, fixed at \$10, and the disbursements of the reference are to abide the event of the action.

SUPREME COURT.

DANIEL B. MARSH and others, appellants, agt. PHILOMELA R. BENSON and ALFRED G. BENSON, her husband, respondents.

This court has no jurisdiction in equity in a suit concerning property, where the matter in dispute, exclusive of costs, does not exceed the value of one hundred dollars. BALCOM, J., dissenting, in the next following opinion.

Sixth District General Term, July, 1860.

Present, MASON, BALCOM, CAMPBELL and PARKER, Justices.

March agt. Benson.

This is an appeal from a judgment entered at the Cortland county special term, in August, 1859.

The action was brought to charge the separate estate of the defendant, Philomela R. Benson, with the payment of a debt of less than \$100, alleged to have been contracted by her after her marriage, for the benefit of such separate estate; and for the appointment of a receiver to take charge of said estate, and apply so much thereof as should be necessary to the payment of said debt, and costs of suit.

On the trial, it being stated and admitted by the counsel for the plaintiffs, in his opening, that the action is an equitable one, and that the plaintiffs' claim against the defendant, Philomela R. Benson, which is sought to be enforced and collected out of her separate estate, is less than \$100. The court held that it had no jurisdiction of the action, and dismissed the complaint with costs.

JOHN T. DAVIDSON, *for appellants.*

L. O. AIKIN, *for respondents.*

By the court, PARKER, Justice. This is an action in which the plaintiffs seeks equitable relief only, and the amount claimed is less than one hundred dollars. At special term the complaint was dismissed for want of jurisdiction on that ground, and the only question raised on the appeal from the judgment entered at special term is, whether this court is bound, as the court of chancery would have been before the adoption of the present constitution, to dismiss the suit, pursuant to the 37th section of article 2, title 2, chap. 1, of the 3d part of the Revised Statutes.

Notwithstanding, it is declared in § 69 of the Code, that "the distinction between actions at law and suits in equity, and the forms of all such actions and suits heretofore existing are abolished;" it is undeniable that we still have

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actions at law and suits in equity: and this distinction is constantly recognized by this court and the court of appeals; and the Code itself has not failed to make provisions founded upon such distinction. Indeed, the constitution recognizes and affirms the distinction as one existing and to remain, where it gives to the supreme court, in art. 6, § 3, "general jurisdiction in law and equity;" and where, in § 5 of the same article, it provides that "the legislature shall have the same powers to alter and regulate the jurisdiction and proceedings in law and equity as they have heretofore possessed;" and when, in § 10 of art. 6, it provides that "the testimony in equity cases shall be taken in like manner as in cases at law. (*See Reubens* agt. *Joel*, 3 *Kern. R.*, 488.) The effect of these provisions of the constitution, as I understand them was, so far as proceedings in equity are concerned, to transfer to the supreme court the general jurisdiction and powers then existing in the court of chancery, and to continue to the legislature the same powers in reference to such jurisdiction and proceedings as they then had. This court, from the time of its organization, became vested with such general jurisdiction and powers of the former court of chancery, precisely as that court had possessed them up to that time, it being declared in the 17th section of art. 1 of the constitution, that "such acts of the legislature of this state as are now in force, shall be and continue the law of this state, subject to such alterations as the legislature shall make concerning the same; but all parts of the common law, and such of the said acts, or parts thereof, as are repugnant to this constitution are hereby abrogated." (*See Wilcox* agt. *Wilcox*, 4 *Kern. R.*, 575, 579.)

At the time the constitution went into effect, the provisions of the statute above referred to, excluding from the jurisdiction of the court of chancery "every suit concerning property, where the matter in dispute, exclusive of

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costs, does not exceed the value of one hundred dollars," was in force.

But if any legislation were necessary to modify the general jurisdiction of the court, in accordance with that provision of the statute, it was had in the judiciary act of 1847, whereby it was enacted that "the supreme court, organized by this act, shall possess the same powers, and exercise the *same jurisdiction* as is now possessed and exercised by the present supreme court and court of chancery," &c., "and *all laws* relating to the present supreme court and court of chancery, or any court held by any vice-chancellor, and the jurisdiction powers and duties of said courts, the proceedings therein and the officers thereof, their powers and duties shall be applicable to the supreme court organized by this act, the powers and duties thereof, the proceedings therein, and the officers thereof, their powers and duties, so far as the same can be so applied, and are consistent with the constitution and the provisions of this act." (*Session Laws* 1847, 323, § 16.) This is a re-enactment of the provision of the statute above referred to: does § 69 of the Code repeal, or in any manner affect, the jurisdictional provisions of that act?

The only effect of that section of the Code is, as I think, to abolish the previously existing distinction between actions at law and suits in equity, so far as the forms of action are concerned, and to reduce all actions to the same mode of proceeding.

The language of the section is entirely consistent with this construction. Taking it all together, its object is plain: to reduce all actions to one form, denominated a "civil action." The first and last clauses are correlatives: the first doing away with an existing condition, the last providing for a new condition in its place. When, therefore, it provides that "the distinction between actions at law and suits in equity, and the forms of all such actions and suits heretofore existing are abolished;" and follows with

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the provision: "and there shall be, in this state, hereafter, but one form of action for the enforcement or protection of private rights, and the redress of private wrongs, which shall be denominated a civil action;" it manifestly intended to substitute one formal method of proceeding in court for the two others previously existing in equity and at law. A "suit" or "action" is defined to be "the formal method of pursuing and recovering one's right in a court of justice." (*Worcester's Dictionary.*) The distinction between actions at law and suits in equity, then, which is abolished, is the distinction between their "formal methods of pursuing and recovering" rights in court. This is the extent of the general object of the Code in this regard, as shown in its preamble, in which it is declared to be expedient that "the distinction between *legal and equitable remedies* should no longer continue, and that a uniform course of proceeding in all cases should be established," the uniform *course of proceeding* substituted for the existing legal and equitable remedies.

This is all the codifiers contemplated, as fully appears from their report to the legislature. They say: "In our remarks upon this section, we shall consider separately the two propositions which it involves. The first is the abolition of the distinction between actions at law and suits in equity." After advertizing to the rise and establishment of the court of chancery, and the difference of judicial opinion as to the precise boundary which separated the powers of law and equity which prevailed, and to the causes which led the convention to adopt the provision of the constitution abolishing the court of chancery, and declaring that "there shall be a supreme court having general jurisdiction in law and equity." They say "a reference to the debates of the body will show that this result was effected by the conviction which was entertained of the injustice of subjecting a party whose rights were involved, to the uncertain chances in the selection of the proper forum by which they were to

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be determined ; and it is not a little singular that this important change in the judicial establishment of the state, owes its origin mainly to the fact that this injustice was the result rather of the *modes of proceeding* than of the rules of determination adopted by the several legal and equitable tribunals" (p. 69). Again, they say "It is no part of our purpose to present the principle of an union of law and equity jurisdiction upon a broader basis than that which has reference to *their forms of proceeding*. It is enough for us to know that the fundamental law has united these functions in one tribunal, and in recommending to the legislature a system of practice by which those functions may be conveniently examined, it is only necessary that we should take care not to encroach upon substantial rights, keeping in view the distinction between rights, on the one hand, and the means of their ascertainment and enforcement on the other, the only question is, whether a mode of proceeding common to all controversies, whether known as legal or equitable, can be safely and conveniently prescribed" (p. 74.)

All that the codifiers had in view, as it seems, was the prescribing of a safe and convenient *mode of proceeding* common to all civil controversies, whether legal or equitable, or in the language of the act of the legislature under which they were appointed, and by which their duties are prescribed, providing "for a uniform course of proceeding in all cases, whether of legal or equitable cognizance" (*Laws of 1847, ch. 59, § 8*), and such, I think, for the reasons above appearing, was the intention of the legislature in adopting that section.

I have said that we still have actions at law and suits in equity. A suit appealing to the equitable powers of the court, and asking for equitable relief, is as properly now a suit in equity as ever. The mode of conducting such a suit in court, is the same as the mode of conducting a suit asking legal relief, or a suit at law, except in those respects

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in which the Code has provided for a distinction, as in §§ 253 and 254. The first of these sections having reference to actions at law (except so far as it provides for actions for divorce), secures a jury trial, as required by the constitution; the second, having reference to suits in equity, in which jury trials have not, in the language of the constitution, "been heretofore used" (*art. 1, § 2*), provides for a trial by the court, as permitted by that article.

The Code provides for further distinctions in §§ 274 and 275, as to the relief granted, and §§ 304 and 306 as to the costs.

This distinction between legal and equitable actions is recognized at every circuit in the trial of causes, pursuant to § 257 of the Code; equity cases, or issues of fact, to be tried by the court, being postponed on the calendar to actions at law, or issues of fact to be tried by a jury.

So it is constantly recognized by this court and by the court of appeals.

An action for mere equitable relief will not be sustained where the plaintiff has a complete remedy at law. (See *Mills* agt. *Black*, 30 *Barb. R.*, 549; *Wilson* agt. *Forsyth*, 24 *id.*, 105; *Mace* agt. *The Trustees of the Village of Newburgh*, 15 *How. Pr. R.*, 161; *Bouton* agt. *The City of Brooklyn*, 15 *Barb. R.*, 375; *Crippen* agt. *Hudson*, 3 *Kern. R.*, 161; *Heywood* agt. *The City of Buffalo*, 4 *Kern. R.*, 534.) In the latter case, the court say "It is still the law that a party who brings an equitable action must maintain it upon some equitable ground; and if his cause of action is of a legal and not an equitable nature, he must bring a legal action, or pursue a legal remedy. When a matter is clearly or *prima facie* one of legal cognizance, a party must, in order to maintain an equitable action upon it, state clearly facts sufficient to entitle him to equitable relief, and to show that a perfect remedy cannot be obtained at law."

The distinction between actions at law and suits in equity, and the distinct jurisdictions in regard to them are

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also recognized in *Sage* agt. *Mosher*, 28 *Barb. R.*, 288; *Reubens* agt. *Joel*, 3 *Kern. R.*, 488; *Voorhees* agt. *Childs' Executor*, 17 *N. Y. R.*, 354.

In this discussion I have not been unmindful of the cases which seem to hold a different doctrine, such as *Giles* agt. *Lyon*, 4 *Const. R.*, 599; *Dobson* agt. *Pearce*, 2 *Kern. R.*, 156; *Crary* agt. *Goodman*, *id.*, 266; *Phillips* agt. *Gorham*, 17 *N. Y. R.*, 270. In *Giles* agt. *Lyon*, the court of appeals decided that the 47th section of the amended Code of 1849, authorizing the supreme court to transfer "equity cases" to the superior court of the city of New York, applied only to suits in equity commenced under the previous system, and did not authorize the transfer of an action commenced under the Code, although such action was strictly equitable according to former distinctions. The construction of the phrase "equity cases" in that section was the question to be decided, and the decision was as above.

Judge *GARDINER*, in giving the opinion of the court says: "The accumulation of causes of this character in the former court of chancery, and the embarrassed condition of the new courts, particularly those in the first district, in consequence of their transfer to them, was notorious; and one great object in creating a new branch of the superior court, was to relieve the supreme court of that district from the burden of investigating causes which were not properly their own. The 47th section was designed as a remedy for the difficulty, and framed accordingly." This is a sufficient reason for the decision; indeed, such being the object for which the 47th section was framed, the construction of the phrase arrived at was inevitable.

Judge *GARDINER*, it is true, in his opinion discusses the effect of the 69th section of the Code, and uses language which might, taken by itself, imply a different understanding of it from the one above given, and yet from the whole of his discussion, as bearing on the question to be decided, I do not understand his opinion to be adverse to the position

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herein taken. His argument, drawn from the 69th section, is that, inasmuch as that section "ordains a *new name* for all proceedings to be thereafter instituted for the redress of private grievances," to wit, a "civil action," the old nomenclature of "actions at law" and "equity cases" being done away, it would be repugnant to construe the term "equity cases" in § 47, as applying to actions commenced under the new system.

In *Dobson agt. Pearce*, and *Crary agt. Goodman*, the court hold that equitable defences may be set up to actions at law. This is expressly authorized by the Code, in § 150, which is a sufficient reason for the decision, and although when these actions were commenced, prior to 1852, that section did not contain the *express* authority which it was made to contain by the amendment of that year, still in *Dobson agt. Pearce*, Judge ALLEN, in giving the opinion of the court, seems to give the same effect to the section before as since the amendment, quoting it as it now is, and applying it to the case. *Crary agt. Goodman* was decided expressly upon the authority of *Dobson agt. Pearce*.

In *Phillips agt. Gorham* it was decided that in an action to recover the possession of land, the plaintiff may attack a deed, under which the defendant claims, upon both legal and equitable grounds. That case came within the provisions of § 167, as expressly declared by Judge JOHNSON, who gave the opinion of the court.

Although, in these cases, the discussions contained in the opinions delivered, might lead to a different conclusion from the one at which I have arrived in reference to the question of an existing distinction between legal and equitable actions, still I do not understand that they, or any of them, have *decided* that question adversely to the view I have taken of it; and I do not see any conflict between the Code and the section of the Revised Statutes above referred to. The jurisdiction of the court is not reached by § 69 of the Code, but remains as it stood when the Code

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was enacted, subject to the aforesaid provision of the Revised Statutes, which prohibits the court from taking jurisdiction in equity in any suit concerning property, where the matter in dispute, exclusive of costs, does not exceed the value of \$100.

Upon this precise question there has been some conflict in the decisions of this court in different districts.

Judge MARVIN held, at special term, that the provision of the Revised Statutes above cited is still in force, and that this court is limited in its jurisdiction by that provision. (*Shepard agt. Walker*, 7 *How. Pr. R.*, 46.)

In *Mallory agt. Norton* (21 *Barb. R.*, 424) the court, at general term in the fourth district, held that an action in the nature of a suit in equity might be maintained against a party who had procured an execution to be issued on a justice's judgment against the body of the defendant therein, the judgment having in fact been paid, for the purpose of perpetually enjoining such party from enforcing the collection of such judgment and execution, notwithstanding the amount of the judgment was less than \$100. Although Mr. Justice C. L. ALLEN, in giving the opinion of the court, discussed the question of the court's jurisdiction, under the provision of the Revised Statutes above cited, and came to the conclusion that the said 37th section was in effect repealed; yet it seems very clear that § 37 has no application to that case, for the reason that the relief asked for was not merely that the judgment be decreed satisfied, but that the party should be perpetually enjoined from enforcing the execution which was against the body of the plaintiff in that action. The suit was not one "concerning property" merely, to which kind of suits alone that section applies. (*Schroeppel agt. Redfield*, 5 *Paige*, 245.) The court, therefore, was not limited in its jurisdiction by that section, and very properly entertained jurisdiction of the case.

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In *Cobine agt. St. John* (12 *How. Pr. R.*, 333) my brother, BALCOM, has come to a different conclusion from the one to which I have come upon this question, and his dissenting opinion in this case maintains the position then taken by him.

It is said that unless this court will take jurisdiction of this action, the plaintiffs are remediless, and that our judicial system affords no means for the collection of debts of less than \$100 against married women. It is true, but no more so now than it has always been, at least since the enactment of the 37th section above referred to, that no mere equitable demand of less than \$100 can be enforced in our courts. If this is an anomaly, it is one which the legislature alone can correct.

I understand that this court, in this district, has repeatedly held, at general term, that it cannot take cognizance of such actions, and I see no reason for departing from the rule held in those cases.

In my opinion the decision at special term was right, and the judgment appealed from should be affirmed, with costs.

MASON and CAMPBELL, Justices, concurred. BALCOM, Justice, dissented, for the reasons contained in his opinion, in the following case of *Durham agt. Willard*.



SUPREME COURT.

JAMES DURHAM and GOULD B. BARLOW agt. JOSHUA WILLARD and WILLIAM N. MASON, surviving trustees of CLARISSA A. WILLARD, CLARISSA A. WILLARD and WILLIAM F. WILLARD.

Sixth District Broome General Term, July, 1860.
Present, MASON, BALCOM, CAMPBELL and PARKER, Justices.

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THIS action was brought to charge certain real estate, situated in the county of Chenango, which the plaintiffs claimed was owned by the defendant, Clarissa A. Willard, wife of the defendant, William F. Willard, with the payment of a debt of less than \$100, that said Clarissa contracted after her marriage, by employing the plaintiffs to repair and paint a house on the premises, which the plaintiffs sought to charge the debt upon.

The action was tried at a special term held in Chenango county in August, 1859. The defendants objected to the plaintiffs giving evidence to establish their cause of action, on the ground that under the complaint the plaintiffs could not sustain the action, their claim against Clarissa A. Willard being less than \$100; that the matter in dispute does not exceed in value, exclusive of costs, \$100; that the court of equity will not entertain an action claiming relief in equity, where the amount claimed is less than \$100, or when the amount of the demand in suit, and involved or in dispute, and as to which relief is demanded, is less than \$100, and moved that the plaintiffs' complaint be dismissed. The plaintiffs' counsel conceded that the claim of the plaintiffs was less than \$100, but opposed the motion. The court thereupon excluded the evidence, and granted the defendants' motion, and dismissed the plaintiffs' complaint. To which decision the plaintiffs duly excepted. Judgment was entered upon the said decision, dismissing the plaintiffs' complaint, with \$41.37 costs to the defendant, William N. Mason, and \$46.50 to the defendant, Clarissa A. Willard. The plaintiffs appealed from the judgment to the general term of the court.

FRANCIS U. GARATT, *attorney*, and LEWIS KINGSLEY, *counsel for plaintiffs*.

WILLIAM N. MASON and ISAAC S. NEWTON, *for defendants*.

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BALCOM, Justice (*dissenting*). A justice of the peace has not jurisdiction to try the cause of action set out in the complaint (*Coon agt. Brook*, 21 *Barb.*, 546); and the only remedy the plaintiffs have to collect their demand against Mrs. Willard is in equity. The debt was created by her subsequent to her marriage, for the benefit of her separate estate, and her obligations incurred for that purpose must be enforced, if at all, as a charge on such estate, and not as a personal liability. (*Rogers agt. Ludlow*, 3 *Sand. Ch. R.*, 104.) It is clear that if the complaint in this action was properly dismissed, the plaintiffs are remediless, and the anomaly exists in our judicial system that prevents the collection of all debts less than \$100, against married women; at least such was the case prior to the passage of the act of 1860, "concerning the rights and liabilities of husband and wife." (*Laws of 1860*, p. 157.) What change, if any, that act has made, it is unnecessary now to ascertain, for this action was tried in 1859, and must be determined by the law as it then existed.

I should not have discussed the question in *Cobine agt. St. John* (12 *How. Pr. R.*, 333), respecting the right to maintain, in this court, actions like this, wherein the claim is less than \$100; if I had known when I decided that case, as I now do, that this court at a general term in this district had passed upon the question, before I came to the bench, and held that equitable actions brought in it concerning property, where the plaintiffs demand, exclusive of costs, does not exceed \$100 in value, should be dismissed with costs to the defendants, precisely as the court of chancery was required to dismiss such actions prior to the adoption of the constitution of 1846; but as my opinion in *Cobine agt. St. John* has been published (though incorrectly in some respects), and the decision made at the general term, which I have mentioned, has not been reported, and this court, at a general term in the fourth district, has held upon this question, in *Mullory agt. Norton* (21 *Barb.*, 424),

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the same that I did in *Cobine agt. St. John*, I think we should regard the question an open one, and determine it as we are now convinced it ought to be settled.

The statute in force when the existing constitution was adopted, read as follows: "The court of chancery shall dismiss every suit concerning property, where the matter in dispute, exclusive of costs, does not exceed the value of one hundred dollars, *with costs to the defendant.*" (2 R. S., 1st ed., 173, § 37.) This section has been omitted in the 4th and 5th editions of the Revised Statutes, and, as I suppose, because the eminent lawyers who supervised their publication were of the opinion that it was abrogated. It restricted the jurisdiction of the court of chancery to suits concerning property, where the matter in dispute, exclusive of costs, *exceeded* the value of \$100. In other words, that court was forbidden to proceed with any suit concerning property, if its value, exclusive of costs, was only \$100, or was less than that sum. But I think this restriction was removed by § 3 of art. 6 of the constitution, which declares "There shall be a supreme court having *general* jurisdiction in law and equity."

The continuation of the powers as they had before existed in the legislature, to *alter and regulate* the jurisdiction and proceedings in law and equity (Con., art. 6, § 5), has no bearing upon the question, whether the conferring of *general* jurisdiction, in equity, upon the supreme court did not abrogate the section of the Revised Statutes above quoted.

If it could be said that the judiciary act of 1847, by implication, revived the above mentioned section of the Revised Statutes, I think the Code has removed such implication. The Code has abolished, so far as was deemed practicable, all distinction between actions at law and suits in equity, and the forms of all such actions and suits as they existed prior to its enactment. (Code, § 69.) By § 306 costs in all suits in equity "may be allowed, or not,

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in the discretion of the court." This is inconsistent with the idea that, *as matter of law*, the court must dismiss a certain class of such suits, *with costs, to the defendant*; and the spirit of the entire Code is opposed to the position that the jurisdiction of this court, of suits in equity, concerning property, is affected in the least by the value of the matter in dispute.

For the foregoing reasons, I am of the opinion the jurisdiction of this court in equity is *general*, as conferred by the constitution.

If this conclusion is correct this court has jurisdiction of this action, and should have heard and determined it upon the merits; and the judgment in it, dismissing the complaint, with costs, was erroneous, and should be reversed, and a new trial granted, costs to abide the event.

Judgment affirmed, for the reasons contained in the foregoing opinion of Justice PARKER, in *Marsh agt Benson.*

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NEW YORK SUPERIOR COURT.

RUSSELL DART agt. GEORGE W. ARNIS.

The right of a defendant to remove a cause into the United States court, is lost where he moves in this court to discharge an order of arrest.

New York Special Term, September, 1860.

PIERREPONT, Justice. This is a motion to remove the cause to the United States court. Under the statute, the defendant, who is a resident of another state, has this right, unless he has appeared in the action. It is conceded that the defendant, by counsel, moved the court to discharge the order of arrest. That motion was argued and denied. The decisions seem to hold that such motion is equivalent to an entry of appearance.

The motion must be denied, with costs, to abide event.

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SUPREME COURT.

GLOADE REQUA and others agt. NATHANIEL B. HOLMES.

Under the present union of common law and equity jurisdictions in the same court, and a modification of its practice, a defendant, in an action of *ejectment*, may set up and rely upon such *equitable defence* as he may have to the plaintiff's right of action, and which was formerly only available by resort to a separate tribunal.

Where the court of appeals have reversed a judgment of the supreme court, and ordered a new trial; and on the second trial substantially the same evidence only is produced, this court, on a review of such second trial, are not bound to follow the decision of the court of appeals, where it appears that some material facts in the case, and some legal principles resulting therefrom, were not brought to the notice of the court of appeals, and which facts and principles have the effect to qualify and perhaps take away entirely the effect of the judgment rendered by that court. Where a party defendant, in a suit in *partition* (in the late court of chancery), *died* pending the proceedings (after an order taking the bill as confessed, and before a referee to the master), *held*, that the suit *abated* as to such defendant, and his interest in the lands which were the subject of it, and his title then vested in his heirs at law; but this event did not remit the proceedings as if they never had been; they were open to be *revived* and resumed at the same stage of progress as they were at the time of such death.

The process by which the representatives of the deceased defendant were to be brought into court, was the service of a copy of an order to revive; but like all other process the service might be *waived*, and the party *appear voluntarily* and become an actor in the proceedings.

And where such proceedings, in partition, after the death of such defendant, were conducted to a sale of the premises, the giving of a deed to the purchaser, and the deposit of the proceeds in court, without an order to revive as to the heirs at law of such defendant,

Held, that the decree of sale was not a final act in the proceedings, and that the heirs at law of such defendant, having subsequently become parties and actors in suits for the distribution of such proceeds, asserting and claiming the regularity of the partition and sale, before any order to revive had been entered or served, was an *appearance* equivalent in all respects to the due service of the order to revive, and concluded them as to the regularity of the proceedings, and estopped them from denying that their title passed by the sale, as against a *bona fide* purchaser of the premises.

Westchester Special Term, April, 1860.

DANIEL LORD, *for the plaintiffs.*

A. J. PARKER, *for the defendant.*

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BROWN, Justice. This is an action of ejectment to secure an undivided interest in certain lands in Greenburgh, Westchester county, which the plaintiffs claim as heirs at law of Samuel Requa, deceased. The premises, with other lands in the same town, belonged formerly to one Isaac Requa, who died sometime previous to the year 1826, intestate and without children, and thereupon his real estate descended to his brothers and sisters (Samuel Requa being one of the brothers), in fee simple, as tenants in common. This action was commenced in January term of this court, in the year 1844, and tried upon the question of the plaintiffs title, before the Hon. CHARLES H. RUGGLES, at Westchester circuit, in November, 1844, when the defendant had a verdict. This verdict was afterwards affirmed at a general term of this court, and judgment entered for the defendant, which was removed to the court of appeals by writ of error, and there reversed, and a new trial ordered. The defendant claims title to the premises in fee, as the grantee of one Steuben Swartwout, by deed, with full covenants bearing date May 2d, 1836. It appears from the proofs that on the 18th of April, 1826, Isaac Davids, and Julia Ann, his wife (Julia Ann being one of the heirs at law of Isaac Requa), filed their bill in the late court of chancery for a partition or a sale of the lands and real estate whereof Isaac Requa died seized. To this bill, and the proceedings consequent thereon, Samuel Requa, whose interest in the lands of Isaac Requa, the plaintiffs claim to recover, and the other brothers and sisters were made parties defendants. The suit proceeded to a decree, and a sale of the premises by one of the masters of the court, to a report and confirmation of the report of the sale and a deed of conveyance of that part of the premises described in the complaint in this action, to Steuben Swartwout, the defendant's grantor, who paid the purchase money therefor. Pending the proceedings Samuel Requa died, whereby his interest descended to the plaintiffs in this action, or to those whose estate the

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plaintiffs claim. The real and only question in controversy between the parties is, whether the plaintiffs are divested of their title by the decree and the proceedings in the late court of chancery, taken in connection with their own acts at and subsequent to that time.

The present proceeding, in its origin, was the common law action of ejectment, limited as a remedy to the trial and determination of the legal rights of those concerned, and to awarding the possession to those having the legal title. Now, however, as a consequence of the union of the common law and equity jurisdictions in the same court, and a modification of its practice, the defendant may set up and rely upon such equitable defence as he may have to the plaintiffs right of action, and which, at the time of the first trial, was only available by resort to a separate tribunal. The evidence upon both trials is substantially the same, except the new and additional fact that the plaintiffs have applied to this court, which succeeded to the jurisdiction and authority of the late court of chancery, for leave to appropriate to their own use, and have applied and appropriated that portion of the proceeds of the sales, under the chancellor's decree, to their own use, which was deposited with the court. There are, however, some material facts in the case, and some legal principles resulting from the existence of those facts, which I shall endeavor to bring out and present, which do not seem to have been brought to the notice of the court of appeals, and which there is reason to think must have the effect to qualify, and perhaps take away entirely the effect of the judgment it has rendered.

The bill of complaint in the chancery suit was regularly taken, as confessed, against all the defendants therein, on the 29th of May, 1826; and on the 18th of June thereafter, Samuel Requa, the plaintiff's ancestor, died. The usual order of reference was obtained on the 23d June. On the 24th the master's report was duly filed, and a decree granted

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for a sale of the lands, with directions that the master make a report of his proceedings to the court, and reserving all other directions until the coming in of the report. On the 16th of August the sale was effected, and Steuben Swartwout, the defendant's grantor, became the purchaser. The master made his report of the sale, and on the 6th of November, of the same year, it was confirmed, and a decree entered directing the master to make and deliver the deed of conveyance to the purchaser, upon payment of the purchase money, and complying with the terms of the sale, with the usual reservation of further directions, and thereupon and on the 23d day of November, 1826, Samuel Youngs, the master, received the purchase money, and executed to Steuben Swartwout the deed of conveyance of that date for the premises in dispute, under which the defendant in this action claims. During all this time no notice seems to have been taken of the death of Samuel Requa. The decree was against all the heirs at law of Isaac Requa, from whom the parties, complainant and defendant, derived their title. *Prima facie*, it was regular. The sale was conducted by an officer of the court of chancery, duly authorized to execute such trusts, and Swartwout purchased the property, and parted with his money upon the faith and confidence that he was obtaining the title.

By the death of Samuel Requa the suit in the court of chancery abated as to him, and his interest in the lands, which was the subject of it. His title then vested in his heirs at law, the plaintiffs in this action, and those under whom some of the plaintiffs claim. It is to be observed, however, that this event did not remit the proceedings even in regard to them to the same condition as if they never had been; but they were open to be revived and adopted; and when they were revived, they stood in the same condition, and were to be resumed at the same stage of progress as they were at the time of the death of Samuel Requa.

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The proceedings to revive were quite simple. A petition, setting out the pendency of the suit, its object, the state of the pleadings, and the stage to which it had progressed, the death of the party, and the names of the persons who had succeeded to his interest in the subject matter. An order to revive, and the service of the order upon the new parties. (*Sec. 7 of the act concerning the court of chancery, passed April 10, 1813; 1 R. L., 488.*) The process by which the representatives of the deceased defendant was brought into court, was the service of a copy of the order to revive; but like all other process the service might be waived, and the party might appear voluntarily. This is what the books of practice denominate appearing *gratis*. Appearing *gratis* is when the defendant, on being informed that a bill has been filed against him, causes an appearance to be entered for him, without waiting to be served with a subpoena. A party may likewise, in certain cases, appear *gratis* at the hearing, and consent to be bound by the decree; but in such cases it is necessary that the party should be named as a defendant upon the record. (1 *Barb. Ch. Pr.*, 81, and the cases referred to in the notes.) Nor was the manner of his appearance of any particular moment. It might be effected by the entry of his appearance by the clerk, by filing due proof of service of a copy of the order, and the lapse of eighty days given by the 7th section of the act, and an entry of his appearance by the party seeking to revive the suit, or it might also be effected by the party appearing voluntarily in court and becoming an actor in the proceedings. A person who became a necessary party to a suit in equity by the death of his ancestor, who appeared without the service of a copy of the order to revive and put in an answer, presented a petition or made a motion in the progress of the suit, could not afterwards object to the regularity of the proceedings for the want of the service of a copy of the order, and much less would he be allowed to claim, in an action against a purchaser in

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good faith of the subject matter of the suit, that the proceedings were absolutely void. Courts could not tolerate or give countenance to a practice of this kind, without impairing the confidence which their proceedings should constantly inspire, and inflicting irreparable injury upon rights acquired by purchasers at judicial sales. A party who means to avail himself of an irregularity in the progress of a cause, must make his objection in due season, and before the other side has compromised itself by his silence, and a person upon whom the law has cast an interest in an estate, which is the subject of a suit in the courts for a sale and partition, must abstain from becoming an actor in the proceedings, if he designs at some future time to assert his title upon the ground that he was not made a party, and therefore not concluded by the judgment or decree.

It is necessary to a true estimate of the effect of the acts of the heirs at law of Samuel Requa, to which I shall refer presently, to bear in mind that the proceedings in the chancery suit were not ended by the sale of the lands under the decree, and the execution and delivery of the deeds. The proceeds were still at the disposal of the court. They were to be distributed, under its direction, amongst those entitled to them, and for all the purposes of distribution they were still to be regarded as real property. They were still subject to the widow's dower, and to the debts of the ancestor. The conversion from land into money was the result of the sale, the act of the law. The land was incapable of partition, so that each of the tenants should enjoy his share in severalty, and therefore the decree of the court had converted it into money, a medium in which a just distribution could be made. The parties could not, however, have both the land and its proceeds in money. The heirs of Samuel Requa could not have the moneys arising from the sales, applied to pay their ancestors debts, and to satisfy his widow's right of dower, and then claim

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and recover the lands themselves out of the possession of the purchaser, whose money they had thus been enabled to appropriate. This, I think, is too plain for argument, and yet this is precisely what the heirs of Samuel Requa, the plaintiffs, claim the right to do, with the sanction and approbation of the highest judicial tribunals of the state.

In August, 1847, the plaintiffs in this action first appeared and became actors in the chancery suit. No order to revive had yet been obtained, and the proceeds of the sale had not been distributed. The occasion of their appearance was this: Minott Mitchell, a creditor of Isaac Requa, the common ancestor, had filed a bill in the court of chancery against his heirs at law, the complainants and defendants, in the partition suit, including Jacob Requa, a son of Samuel Requa, in his character of administrator, &c., of Isaac Requa, for the recovery of his debt, and had obtained an injunction restraining the distribution of the moneys arising from the sales in the suit in partition. The plaintiffs in this action, together with the other defendants in the partition suit, by William N. Dyckman, one of the solicitors of the court, presented their petition to the court, stating the facts to which I have referred, praying for a reference to ascertain and report the sum due to Minott Mitchell from the estate of Isaac Requa, and for a dissolution of the injunction, and such other and further relief as might be just. This proceeding resulted in an order of the court, taking from the proceeds of the sale the sum of \$500, and placing it in the hands of the assistant register, to answer any decree which Minott Mitchell might obtain for the recovery of his debt, and for the dissolution of the injunction. William Van Wart, surviving executor of John Van Wart, deceased, another creditor of Isaac Requa, had also filed a bill in the court of chancery against his heirs at law, including the heirs at law of Samuel Requa, for the same purpose as that filed by Minott Mitchell, and had also obtained an injunction restraining the distribution of the

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proceeds of the sale in the suit in partition; and thereupon the heirs at law of Samuel Requa, acting in concurrence with the other heirs at law of Isaac Requa, defendants in the chancery suit, procured another order to be entered in the partition suit, taking from the proceeds of the sales of the lands \$1,593.20, and delivering the same to the assistant register, with directions to invest it on bond and mortgage, at interest, and pay such interest half yearly to Harriet Requa, the widow of Isaac Requa, for and during her natural life, in satisfaction of her dower in the lands sold under the decree. In these proceedings the plaintiffs in this action, or those whose estate they claim, represent themselves, and are named as parties defendant in the suit for the partition of the lands. On the 1st of October, 1827, the plaintiffs in the last named suit presented their petition to the chancellor, setting out the proceedings therein, the decree for the sale, and the sale of the lands by the master under the decree, the death of Samuel Requa, and giving the names of the plaintiffs and heirs at law of Samuel Requa, who were entitled to an interest in the proceeds of the sale of the lands sold by the master; and thereupon the usual order was obtained and entered, that the action in all things stand revived against such heirs of Samuel Requa. In August or September, 1841, such heirs of Samuel Requa, by William N. Dyckman, their solicitor, presented and filed with the court of chancery their petition, representing that they were parties to the suit in partition, setting out the decree for the sale, and the sale of the lands, and the payment of the purchase money, the deposit of the two sums to which I have referred, to abide the result of Minott Mitchell's suit, and for the satisfaction of the widow's dower; and that the residue of such purchase money had been paid by the master into the hands of James Smith, the solicitor, for the plaintiff in the partition suit. That after the decree of sale, on or about the 1st day of October, 1827, Samuel

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Requa died, and the suit and proceedings were duly revived against the heirs at law of Samuel Requa, giving their names, and praying for an order of reference to report the sum chargeable to James Smith, the solicitor, for the moneys so received by him, with the interest, and for an order that he deposit such sum with the assistant register, to the credit of the partition suit. This petition is accompanied by the usual notice to Smith, of the time and place when it would be presented, and by Smith's affidavit in reply thereto; but what order was taken thereon by the court, or whether such petition was prosecuted further than the presentation and the filing thereof with the court, does not appear. Enough, however, appears from these papers and applications, to show that the plaintiffs, or those whose title they claim, regarded and represented themselves as parties to the partition suit, and that portions of the proceeds of the sale were actually appropriated and applied to the uses and purposes which they indicated and desired. While they were thus claiming and exercising the right to be heard as parties in the suit, and to induce the court to dispose of the proceeds of the sale in payment of their ancestors debts, and in satisfaction of his wife's dower in the lands sold, they represented to the court that the decree of sale was entered and actually executed in the lifetime of their father, Samuel Requa, and that he died on or about the 1st day of October, 1827, and not on the 18th day of June, 1826, as they now claim to prove, and that the suit was duly revived against his heirs after such decree and sale. They or their grantors appeared and represented themselves to the court, as parties having a right to be heard, both before and after the entry of the order to revive. The time of its entry thus becomes a matter of no moment. The court of chancery had a right to confide, and did confide in the truth of what they said. It had a right to act, as it did most certainly act, upon the truth of their assertion, and assume that the decree was entered,

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and the sale was effected in the lifetime of Samuel Requa, and the suit duly revived after that time. Unless the formulas of the courts, and a literal observance of their rules of practice are to be deemed of more value than the legal and equitable principles which they are designed to assure, these plaintiffs will not be suffered to gainsay now what they solemnly asserted at that time. Mr. Justice BOWEN, who delivered the opinion of the court of appeals, observes: "Had the order reviving the action been made prior to the decree directing the sale, but subsequently to the other proceedings in the action after the death, and had the heirs appeared in the action without objecting to or moving to set aside such subsequent proceedings, they would doubtless have been bound by the decree. They would in that case have been parties thereto; but I do not see how the order, especially without being served upon them, could have had any retroactive effect." I have already endeavored to show that the appearance of the new parties as actors in the cause, without service of a copy of the order to revive, was equivalent in all respects to the due service of the order, and the proof is quite clear that the heirs of Samuel Requa did so appear both before and after the entry of the order. I have also attempted to show that the decree of sale was not a final act in the proceedings. It was but a step in their progress, which was open to be corrected, if irregular, to be confirmed or set aside, as the court might decree right; and if the sale and execution of the decree intermediate the death of Samuel Requa, and the order to revive against his heirs was an irregular proceeding (as it doubtless was), I respectfully submit it was one which the parties concerned might waive, and which, by their omission to correct by a motion to the court, and more especially by adopting what had been done, and claiming the proceeds of the sale, they must be deemed to have waived. Again, the same learned justice says: "If the plaintiffs had received their due proportion of the proceeds of the sale,

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probably they would have been estopped from denying that their title passed by the sale. At all events they could, in that case, be compelled by an action brought against them for that purpose, either to convey their interest in the premises, or to refund the purchase money received by them; but it does not appear that they, or any of them, have received a dollar of the proceeds of the sale, or that any part has been applied to their use." It is to be observed that whatever remedy, in the case supposed by the judge, the defendant had against the plaintiffs for a conveyance of the premises by way of action, may now be set up as matter of defence to the plaintiffs action; and I respectfully submit it, as a further observation, that it can make no difference in principle whether the proceeds of the sale came into the hands of the plaintiffs themselves, or were applied and paid over to another by their express direction. The proof shows now, as it showed upon the former trial, that \$500 of the proceeds was set aside to pay a debt due, or thought to be due by the ancestor, and \$1,593.20 invested at interest for the use of his widow. As this disposition was made by the court at the request of the heirs of Samuel Requa, it is not in my power to distinguish it in principle from a payment over to themselves.

It is also said in the opinion to which I have referred, and so also upon this trial, that William N. Dyckman, the solicitor who appeared for the heirs, and presented the petition and procured the orders in regard to the proceeds of the sale, was not authorized by any of them so to appear. This I think is a misapprehension. The testimony of Dyckman was read upon the present trial from the bill of exceptions, upon which the argument was heard in the court of appeals. He says: "He was first employed by Jacob Requa, a son of Samuel Requa, and Daniel Requa, his uncle, which must have been shortly after the death of Samuel Requa, for he was employed in relation to the suit instituted by Minott Mitchell against the heirs of Isaac

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Requa. He never was retained by the heirs of Samuel Requa specially in the partition suit, and that he was not retained by them at all until after Minott Mitchell had commenced his suit, and when first employed supposed the proceedings in the partition suit regular. The sale had been made. He was first employed in the suit of Minott Mitchell, to get rid of his injunction, to the end that distribution might be made." He was not employed specially in the partition suit. The sale had taken place; he supposed the proceedings regular, and there was no dispute about the title or the rights of the tenants in common; but he was employed to remove the injunction of the creditors of the ancestor, which impeded the distribution of the proceeds, to the end that his clients, the present plaintiffs, might take their share of the proceeds; and he could have no other useful employment for his clients in the premises. To do this his clients necessarily became actors in the partition suit, and hence the petitions and the orders made in the partition suit. This was employment enough for all the purposes of this argument, for it was an employment with respect to the subject matter of the suit in partition, and whether it then existed in land, or the money proceeds of the land, made no sort of difference. He was, therefore, upon his own showing, fully authorized to do all that he did in relation to the proceedings in the suit. The authority of an attorney or solicitor to appear and defend, will be presumed and taken for granted until it is made to appear otherwise. "As a general rule when a suit is commenced or defended, or any proceeding is had therein by a solicitor of the court, it is not the practice to inquire into his authority to appear for his supposed client; but if the party for whom he appears, or assumes to act, denies his authority, and applies to the court for relief before the adverse party has acquired any right or suffered any prejudice in consequence of the acts of the solicitor, the court may correct the proceeding, and compel the solicitor to pay

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the costs to which the parties have been subjected. If the adverse party has acquired rights, or been subjected to costs by proceedings in the name of a party who afterwards denies the authority of the solicitor or attorney, the courts are in the habit of permitting the proceedings to stand, where the solicitor or attorney is a responsible person, leaving the injured party by such unauthorized proceedings in his name, to seek redress against the solicitor or attorney, by a summary application to the court or otherwise. (*American Insurance Company agt. Oakley*, 9 *Paige*, 496.) When an innocent purchaser is substituted for the adverse party, and exposed to the loss of the subject purchased, and when the case is marked by the absence of all effort to correct or set aside the unauthorized acts, the rule applies with additional force. I have thus discussed the case upon the same facts as they substantially appeared upon the first trial; and I have endeavoured to bring out some views which were not brought to the notice of, and certainly were not considered by the court of appeals in rendering its judgment. I think they are decisive against the right of the plaintiffs to recover in the action. I now proceed briefly to examine the effect of the additional evidence produced upon the second trial, upon the issue made by the supplemental complaint and answer.

During the pendency of the original suit, and on the 6th of December, 1852, Clara Requa, one of the plaintiffs, died intestate and without issue, and her estate, if any, in the premises descended to her surviving brothers and sisters. Harriet Requa, the widow of Isaac Requa, likewise died some time in October, 1854, whereby the parties in the partition suit became entitled to the sum of \$1,593.20, invested by the court of chancery for her benefit. Jacob Requa, one of the sons of Samuel Requa, thereupon applied to this court, which had succeeded to the jurisdiction of the late court of chancery, by petition, setting out the existence of the fund, the death of the tenant for life, and

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the names of the persons entitled to distributive shares thereof; and praying for the usual order of reference. This petition was sworn to on the 17th May, 1855, and the order of reference was obtained at the special term held in the city of New York, on the 22d of May, in the same year. The referee made the usual examination, and took the usual means to bring in all the parties interested, including the plaintiffs in this action, or those under whom they claim; and on the 24th of October, 1855, he made his report. It was confirmed on the same day, and an order for the distribution of the fund was obtained at the special term held in the city of New York. In these proceedings the plaintiffs in this action, or those under whom they claim, are named in the title as parties defendants in the partition suit from the proceeds of the sales in which the fund proceeded; and they are also named as distributees, and in the referees report, and the order for confirmation and distribution, the shares to which they are severally entitled, and the amounts thereof are particularly designated. The plaintiffs, or those under whom they claim, thereupon made their power of attorney to Jacob Requa, bearing date the 5th day of November, 1855, and duly acknowledged before a duly qualified officer, by which it authorized and empowered him to demand and receive from the chamberlain of the city of New York, in whose custody the fund was, three distributive shares of the same, and to execute receipts therefor. The money was accordingly paid over to their attorney, and his receipts given for the same, were produced and read upon the trial. It also appeared upon the trial, that on the 15th day of April, 1858, James Requa, one of the original plaintiffs in the action, died intestate, and the present plaintiffs, Mary Augusta Requa, Isaac B. Requa, Francis M. Requa, Gloade Requa, Susan Requa, Winfield S. Requa, and Clara Requa, became his heirs at law. The plaintiffs also read in evidence a deed of conveyance from Jacob Requa to Nathaniel Requa, dated

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June 28th, 1859, for his interest in the estate of Clara Requa in the premises; and also a deed from Amy Wiltse, formerly Amy Requa, dated June 28th, 1859, to Gloade Requa, for her estate in the premises. After what I have said upon the state of facts which existed and appeared upon the first trial, any further comment upon the additional evidence is quite unnecessary. The application for the receipt of a part of the proceeds of the sales in the partition suit in 1855, are acts of the same character, and tending to the same legal results as those which occurred in 1827 and 1841.

The title of the defendant to the premises in dispute may be sustained upon two grounds: first, the sale to his grantor, under the decree in partition, professed to be a sale of all the lands described in the deed, and not of an undivided interest therein. He intended to purchase in good faith, and supposed he had purchased the entire property. It was for that, and nothing less, he paid his money. In executing the decree and selling the lands, the court of chancery may be regarded as the trustee for the owners and parties in interest. The plaintiffs in this action, or those under whom they claim, having appeared in the action, representing themselves as parties thereto, and entitled to be heard; and the court having applied the proceeds of the sale to such uses as they directed, they must be deemed to have adopted, ratified and affirmed the sale, and all that the court of chancery did in the premises. In *Baker agt. Braman* (6 *Hill*, 4) it was held that a party might by his acts waive the benefit of a statute, as well as a constitutional provision in his favor; that where a private road was laid out in violation of the provision of the constitution of 1821, the parol consent of the owner, manifested by his bringing an action for the damages awarded, was an adoption of the machinery provided by the statute, and effectuated the grant. This doctrine is affirmed by the court of appeals, in *Embry agt. Counin* (3 *Com. R.*, 511).

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Second, the acts of the plaintiffs, to which I have referred, operate as an estoppel *in pais*. This class of estoppels are defined by Mr. Justice NELSON, in *The Welland Canal Company* agt. *Hathaway* (8 Wend., 483). As a general rule, he says: "a party will be concluded from denying his own acts or admissions, which were expressly designed to influence the conduct of another, and did so influence it; and when such denial will operate to the injury of the latter. The acts and declarations of the party operate against him in the nature of an estoppel, when in good conscience and honest dealing he ought not to be permitted to gainsay them." In *Dezell* agt. *Odell* (3 Hill, 215), Mr. Justice BRONSON says: "before a party is concluded it must appear, first, that he had made an admission clearly inconsistent with the evidence he proposes to give, or the title or claim he proposes to set up; second, that the other party has acted upon the admission; and third, that he will be injured by allowing the truth of the admission to be disproved." It was said upon the trial that neither the defendant nor his grantor had acted upon the faith of the plaintiffs representations, and therefore one of the material and essential elements of an estoppel *in pais* was wanting. This I apprehend is a mistake. The plaintiffs made no representation whatever to the defendant or his grantor. They did not deal with either of them. The representations that Samuel Requa had died after the decree and the sale of the lands, and that the plaintiffs were parties to the action, and entitled to the proceeds of the sale, was made first to the court of chancery and afterwards to this court. The courts held the funds not as their own property, nor for the government of the state, but for the owners of the lands, if the title had passed, and if not, for the purchaser who had paid the money; and in relying upon the truth and good faith of the plaintiffs representations, and parting with defendant's grantors money, the courts acted for him, and the act must have the same effect.

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as if done by him, and the plaintiffs are concluded by what was done.

The defendant is therefore entitled to judgment, and to recover his costs of the action; and he may also, if so advised, make it a part of the judgment, that the plaintiffs be perpetually restrained from asserting any title to the premises in question, and may take an order amending his supplemental answer, so as to claim this additional relief.

NEW YORK OYER AND TERMINER.

THE PEOPLE agt. JAMES SHEPHARD.

The court of general sessions in the city of New York have authority to send to the next court of oyer and terminer in that city, any indictment found in the court of sessions, not heard and determined, as fully as might have been done before the act of 1855. (That act gives power to the general sessions to hear, determine and punish capital offences, the same as the oyer and terminer, and upon conviction, providing a writ of error to review such cases before the supreme court and court of appeals.)

But where the court of appeals have granted a new trial in a case of capital offence, tried in the court of general sessions, on the ground alone that the verdict of the jury was contrary to evidence, and have sent it back to the general sessions for trial, the case should not, especially without any reasons assigned, be sent to the oyer and terminer for such new trial; it should be had in the general sessions.

New York Oyer and Terminer, January, 1860.

MOTION to remit the indictment in this case to the court of general sessions for trial.

NELSON J. WATERBURY, *for the people.*

JOHN W. ASHMEAD, *for the prisoner.*

INGRAHAM, Justice. In this case a new trial was ordered by the court of appeals, and the case was sent back to the court of sessions for trial. At the last term of that court an order was made, on the application of the district attor-

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ney, sending the indictment for trial to the oyer and terminer. A motion is now made that the indictment be remitted for trial to the court of sessions.

The counsel for the prisoner urges, in support of his motion, that since the passage of the act of 1855, the prisoner has a right to insist upon a trial in the sessions, where the indictment was found, and that the district attorney and court of sessions cannot, by sending the indictment to the oyer and terminer, deprive the prisoner of the right which the statute gives him to a writ of error as a matter of right, and to a review of the finding of the jury upon the facts, if the prisoner should be convicted.

The act of 1855 does give to a prisoner convicted in the sessions of a capital offence such a right, but such a right does not depend upon the finding of an indictment in the sessions. The statute allows this only in the case of a conviction in that court, and the provisions of law as to the sending of indictments from that court to the oyer and terminer for trial, are in no way effected by that statute.

By the statute (2 R. S., 5th ed., p. 303, § 6) the court of sessions was directed to send to the oyer and terminer all indictments for offences, which at the time of the passage of the statute was not triable therein, to the oyer and terminer, and at that time no capital case could be tried in that court.

Since the law has been so altered as to give that court the power to try indictments for all offences punishable with death, the obligatory part of those provisions, which compelled the court to send such indictments to the oyer and terminer, has of course ceased to be operative, and if this were the only authority for sending indictments from the sessions, there might be some doubt whether, under that section, the indictment could properly be sent to this court for trial; but the 7th section, on the same page, gives to the sessions a discretionary power to send to the

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oyer and terminer all indictments for offences triable in the sessions, which shall not have been tried and determined ; and provides for the trial of such cases in the sessions if the oyer and terminer should remit such indictments again to the sessions without trial.

The provisions of this section are ample, to authorize the sending of all indictments found in that court to the oyer and terminer ; and if the enlargement of their jurisdiction has any effect to limit the power of the court under the 6th section, the same cause would extend the operation of the 7th section. The two sections, taken together, were evidently intended to compel the sessions to send to the oyer and terminer all indictments for offences which they could not try, and to give to that court a discretion to send any case which they could try to this court, if they deemed it expedient so to order, and notwithstanding the passage of the act of 1855 extending the jurisdiction of that court, I am of the opinion that they possess the same power now as to all indictments pending in that court.

The intent of the legislature in the 7th section, at its original passage, was probably to direct a more general transfer of indictments by the sessions to the oyer and terminer, than is now supposed.

In England, when the court of oyer and terminer, and jail delivery was held in any county, that court had the entire control of the criminal business of the county during its sessions, relating to prisoners in jail wherever indicted (4 *Black.*, 270), and on the organization of those courts in this state the same powers were given. By the act relating to those courts, as revised in 1813 (1 *R. S.*, 336, §§ 16, 47), such jurisdiction was continued.

The statute regulating courts of sessions (2 *R. S.*, 150), not only made it obligatory upon the sessions to send to the next supreme court, or oyer and terminer, the indictments for offences not triable by the sessions ; but by § 3 that court was directed to send all indictments against pri-

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soners in jail, not heard or determined, to the next court of oyer and terminer, and with provision for remitting them back to the sessions if not tried during that court.

The object of these provisions was undoubtedly to relieve the prisoners during the setting of the court as far as possible, and entire jurisdiction for that purpose was given to the court. In the *Revised Statutes* (2d vol., p. 209) this section was so altered as to make it permissive, and not obligatory on the sessions, to send all indictments to the next oyer and terminer whenever it was to be in session, but in other respects the power and authority remain the same.

I have no doubt of the authority of the court of sessions, under these provisions, to send to the next court of oyer and terminer any indictment found in that court not heard and determined as fully as might have been done before the act of 1855.

In the present case, however, there are other reasons why I deem it proper to remit this case to the sessions for trial. The indictment was originally tried in that court. The court of appeals have granted a new trial, not for any errors of law, but because they thought the verdict of the jury was contrary to the evidence. They sent it back to that court for trial. No reason is shown why the case should not be again tried in that court. The legislature have conferred upon the sessions authority to try such cases, and although in cases where an indictment for an offence punishable with death, found in that court, is removed into this court before any trial has been had, I should not hesitate to retain the same for trial here, yet under the peculiar circumstances of this case, I think unless some good reason is shown therefor, the new trial should take place in the same court where it was previously tried.

There are several cases now pending in this court for trial, which will require all the time of the court to dispose of them within the period allowed for its session; and as

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no reason whatever is stated by the district attorney to show the necessity of the trial here in this case, I am of the opinion that the motion to remit the indictment to the sessions should be granted.

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BUFFALO SUPERIOR COURT.

SAMUEL F. PRATT and others agt. ALLEN and BUTTS.

Where a party obtains judgment under § 247 of the Code, he can recover *costs as upon a trial*.

Where more than one action is brought upon a bond, promissory note, or other instrument against different parties thereto, as mentioned in § 304 of the Code, a *full bill of costs* can only be recovered or taxed in *one action*, and the *disbursements* only in the others; and where there is but *one* such action brought, and there is a proper *severance* caused by the acts of the defendants, the same principle prevails. But where, after severance and judgments, *two appeals* are brought (which are in the nature of original or new actions), the plaintiff, if he succeeds, is entitled to *full costs upon both appeals*. The provision of § 304 does not apply to the costs upon an appeal prosecuted by the defendant.

March General Term, 1858.

Present, VERPLANCK, CLINTON and MASTEN, Justices.

MOTION by defendants for retaxation of costs.

GEORGE W. HOUGHTON, for defendants.

SHERMAN S. ROGERS, for plaintiffs.

By the court, MASTEN, Justice. This is an action brought against the defendant, Allen, as the maker, and the defendant, Butts, as an indorser of a negotiable promissory note.

The defendant, Allen, demurred to the complaint, and judgment was applied for and given to the plaintiff upon the demurrer as frivolous, by Justice CLINTON, under the 247th section of the Code.

The plaintiff thereupon severed the action, taxed a full bill of costs as upon a trial, and perfected judgment

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against Allen. The defendant, Butts, subsequently put in an answer, and the plaintiff applied, under section 247 of the Code, to Justice CLINTON, for judgment under the answer as frivolous, and it was given. The plaintiff taxed a full bill of costs, and perfected judgment against Butts. Allen appealed from the judgment against him to the general term. Butts also appealed to the general term from the judgment entered against him. Both judgments were affirmed with costs, and judgment of affirmance, with full costs, on appeal, was perfected on each appeal.

The first question presented for our consideration is, whether the plaintiff, when he obtained judgment under the § 247 of the Code, recovers costs as upon a trial. This question has been frequently considered by the courts, and the decisions upon it are so conflicting, that the question must be considered an open one.

The section reads thus: “§ 247. If a demurrer, answer, or reply, be frivolous, the party prejudiced thereby, upon a previous notice of five days, may apply to a judge of the court, either in or out of the court, for judgment thereon, and judgment may be given accordingly.”

Before the Code, if a party put in a frivolous demurrer, his adversary might notice it for argument as frivolous. The cause, in such case, was entered upon the calendar in its regular place, and when brought on was heard as an enumerated motion. (2 *Cai. R.*, 100.)

All the advantage that the party obtained, by specifying in his notice of argument that he intended to apply for judgment on account of the frivolousness of the demurrer, was the right, on certain days, to move the cause out of its order, and thus obtain a preference. If it appeared to the court that the demurrer was frivolous, they gave judgment upon it. If it was not so manifestly bad as to raise a presumption that it had been interposed for delay, and thus was frivolous, it retained its place on the calendar for argument, when regularly reached, and the party neither

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gained nor lost anything by his attempt to move it out of its order.

So, too, if a party put in a frivolous plea, his adversary might demur to it, and notice it as in a case of a frivolous demurrer, and move it to a hearing out of its order. (*Hartford Bank agt. Murrell*, 1 *Wend.*, 87.) The object of this practice was to discourage frivolous demurrs and pleas by preventing those delays which tempt them. But they were heard and disposed of as *enumerated* motions, the same as if they had been reached and heard in their regular call upon the calendar. The plea and demurrer remained upon the record, and were incorporated in the judgment roll.

This practice is retained by § 247 of the Code, with modifications and improvements.

When applications for judgments, upon frivolous answers and demurrs, could only be made upon full notice at the stated terms of the court, the temptation to put them in, from the delays necessarily consequent upon that practice, was great.

The Code, in the section under consideration, has lessened those temptations by allowing the application to be made to a judge, upon short notice.

The court, too, is relieved, in a great measure, from disposing of these applications.

The judge is put in the place of the court; he hears the pleadings read, and if the issue is clearly and plainly bad, he pronounces the judgment of the court upon it precisely the same as the court itself did under the former practice. The pleadings remain on the record, and go into the judgment roll.

If the case is one of doubt, the judge simply says it is not frivolous, and it goes to its place upon the calendar to be heard, in its regular call, by the court. When the answer or reply is frivolous, the party aggrieved need not now, as formerly, demur; but may proceed directly upon

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the objectionable pleading, the notice for this purpose being equivalent to a demurrer in analogy to the practice upon pleas in chancery.

A trial, as defined by the Code (§ 252), "is the judicial examination of the issues between the parties, whether they be issues of law or of fact."

The office of a demurrer is to tender an issue of law; it confesses the facts, but denies that they constitute, in law, a cause of action or a defence, as the case may be. This issue must be passed upon in rendering judgment upon the demurrer.

The questions presented may be grave and difficult, requiring great deliberation, or they may be plain and easy of solution; so easy as to raise the presumption that the issue was not tendered in good faith.

But, in either case, a judgment upon the demurrer involves an examination, varying only in degree, of the issues, whether or not the facts constitute, in law, a cause of action or defence.

I am of opinion that the judgment given by my brother, CLINTON, against Allen, upon the demurrer, and the judgment given by him against Butts, upon his answer, involved a "judicial examination of the issues of law between the parties." The plaintiff was, therefore, entitled to costs of a trial.

2d. The next question is, whether the plaintiff was right in taxing a full bill of costs against both Allen and Butts. The action originally commenced against both of them was properly severed.

In 1813, it was enacted that the plaintiff "shall in no case, when two or more suits are depending at the same time upon the same bond or recognizance, or on any promissory note or bill of exchange, recover more than the costs of one of the said suits." (1 R. L., 522, § 14.)

In 1818, it was enacted "that in several suits upon the same instrument or note, and in suits against the makers

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and indorsers of a note, and in suits on bills of exchange, against the drawer, acceptor or indorsers, there shall be a *taxation and recovery* of full costs as against the party defendant in one suit only, at the election of the party plaintiff; and in the other suits on the same instrument, note or bill of exchange, the party plaintiff shall not have *taxed* or be *allowed* any costs excepting for actual disbursements now taxable by law." (*Laws of 1818*, p. 280, § 6.)

In 1830, by the Revised Statutes (vol. 2, p. 615, § 15), it was enacted that "where several suits shall be brought on one bond, recognizance, promissory note, bill of exchange, or other instrument, and where several suits shall be brought against the maker and indorsers of a note, or against the drawer, acceptors or indorsers of a bill of exchange, there shall be *collected or received* from the defendant the costs, taxed in one suit only, at the election of the plaintiff, and in the other suits the actual disbursements only, of the plaintiff, shall be *collected or received* from the defendant."

In 1849, by the Code, § 304, it was enacted: "When several actions shall be brought on one bond, recognizance, promissory note, bill of exchange, or other instrument in writing, or in any other case for the same cause of action, against several parties who might have been joined as defendants in the same action, no costs other than disbursements shall be *allowed* to the plaintiff in more than one of such actions, which shall be at his election, provided that the party or parties proceeded against in such other action or actions shall, at the time of the commencement of the previous action or actions, have been within this State and not *secreted*."

The Code of 1848 contained no provision on the subject.

The act of 1818 prohibited the *taxation* of a full bill of costs in more than one action, while the Revised Statutes allowed the taxation of a full bill of costs in each action, but restricted the collection to the costs taxed in either

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one of the suits, at the election of the plaintiff, and to the disbursements in the others.

Under the act of 1818, the taxation of the costs in one of the suits was an election on the part of the plaintiff, and he could in the other suits only tax the disbursements.

Under the Revised Statutes, the plaintiff could, at any time before he had collected and received the costs, make his election in which action he would collect the full costs.

Under the act of 1813, the plaintiff could *recover* no more than the costs of one suit.

The defendants claim that the Code has restored the rule adopted by the statute of 1818, and the plaintiffs claim that the rule of the Revised Statutes is in this particular unchanged. The question is to be determined by the meaning of the word "allowed," as used in this section. A mere change of phraseology should not be construed as changing the meaning of a former statute, unless it clearly indicates that it was the intention of the legislature to make a change. If, therefore, the word "allowed" had only been used in this section, I should be strongly inclined to so construe it as to retain the meaning of the enactment in the Revised Statutes. The award of costs either by the law or by the court was formerly styled the recovery of costs. In the Code it is called the allowance of costs. Section 303 declares that "there may be *allowed* to the prevailing party upon the judgment, certain sums by way of indemnity for his expenses in the action, which allowances are in this act termed costs."

§ 304 says: "Costs shall be *allowed* of course to the plaintiff upon a recovery in the following cases."

§ 305. "Cost shall be *allowed* of course to the defendant in the actions mentioned in the last section, unless the plaintiff be entitled to costs therein."

§ 306. "In other actions costs may be *allowed*, or not, in the discretion of the court."

§ 307. "When *allowed*, costs shall be as follows."

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§ 308. "In addition to these allowances there shall be *allowed* to the plaintiff," &c.

§ 315. "Costs may be *allowed* on a motion," &c.

From the manner in which the word allowed is used in these sections, it seems to me that in the provision under consideration the word allowed was used as synonymous with the word awarded or recovered.

I am therefore of the opinion that in cases mentioned in the section, a full bill of costs can only be recovered or taxed in the one action, and the disbursements in the other. I am also of opinion that this case is within the provisions of the section under consideration.

It is not within the literal terms of the section, for that is, "where several actions shall be brought," &c. Here was but one action brought, and the severance was occasioned by the acts of the defendants; but it is within the spirit of the act.

The 2d section of chapter 211 of the Laws of 1835 (p. 248), which I think is still in force, makes the above quoted § 15 of the Revised Statutes, for which the one under consideration is a substitute, applicable to an action brought against the several parties to a note, &c. The plaintiff is entitled to recover full costs upon both appeals. The action had been severed.

An appeal is in the nature of an original or new action brought by the party appealing, and like a writ of error may be prosecuted by a new attorney without substitution. (*McLaren agt. Charrier, 5 Paige, 530.*) The provision of the section under consideration does not apply to the costs upon an appeal prosecuted by the defendant.

The costs were rightly adjusted in the case of Allen. In the case of Butts there must be a retaxation upon the principles stated.

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SUPREME COURT.

In the Matter of CATHARINE FORBES.

The statute of 1833, which declares "all common prostitutes who have no lawful employment whereby to maintain themselves," to be *vagrants*, does not authorize the conviction, as a vagrant, of a "*common prostitute and idle person*" merely.

When a statute gives a precise definition of *vagrancy*, the magistrate *must follow it, and insert it in the warrant of commitment*, if he determines the individual to be a vagrant, and attempts to state the facts which constitute *vagrancy*; otherwise the warrant is *void on its face*.

It seems, that there is no common or statute law which requires common prostitutes, who have *lawful employment whereby to maintain themselves*, to be more *industrious* than any other persons, in order to exonerate them from *vagrancy*.

New York Special Term, August, 1860.

HABEAS CORPUS, to discharge Catharine Forbes from custody on commitment as a vagrant.

A. SANFORD, *for the defendant.*

MR. SEDGWICK, *assistant district attorney, for the people.*

SUTHERLAND, Justice. The warden of the city prison returns to the writ of *habeas corpus* allowed by me in this matter, a copy of the warrant of commitment under which the prisoner was received into his custody, and by virtue of which she is held and detained.

After hearing counsel, and after giving to the subject the most serious consideration called for, as I thought by its great importance and public interest, I have come to the conclusion that the warrant of commitment on its face is absolutely void, and that the prisoner must be discharged, on the ground that it does not appear on the face of the commitment that the prisoner has been duly convicted of being a vagrant, or indeed that she has been convicted or committed for any offence or crime whatever.

The question on the face of the commitment arises in

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this manner. The warrant of commitment (which is under the hand and seal of Justice Quackenbush, one of the police justices of this city) not only in due form recites the conviction of the prisoner on competent testimony, of being a vagrant, but proceeds to state and specify the facts, circumstances or conditions, which made or constituted the prisoner a vagrant, and on competent proof of which it must be assumed that the committing magistrate determined that the prisoner was a vagrant. The words of the commitment are: "Whereas Catharine Forbes stands charged, and is on competent testimony made before me, lawfully convicted of being a vagrant—*in this, to wit: That she is a common prostitute and idle person, of which conviction a lawful record in due form has been made and filed, and it appearing to me for the cause aforesaid that she is a vagrant within the meaning of the statute, &c.; I do adjudge and determine that she be committed,*" &c.

The commitment then, on its face, presents this question: Did competent and satisfactory testimony that the prisoner was a common prostitute and idle person authorize her conviction and commitment as a vagrant? There was no such common law offence or crime as vagrancy or idleness, or vagrancy and idleness. By certain statutes all persons coming within a certain description defined and declared by the statutes are declared to be vagrants, and provision is made for their trial, conviction and imprisonment. We have two such statutes. By the Revised Statutes (2 R. S., 879, 5th ed.): "*All idle persons, who not having any visible means to maintain themselves, live without employment; all persons wandering abroad and lodging in taverns, groceries, beer-houses, out-houses, market places, sheds or barns, or in the open air, and not giving a good account of themselves; all persons wandering abroad and begging, or who go about from door to door, or place themselves in the streets, highways or other public places to beg or receive alms, shall be deemed vagrants.*" Common prostitutes as such are not

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named in this statute, and although they may be, and are, perhaps, most likely to be, or to become vagrants within the description of the statute, yet it is plain if a common prostitute is lawfully convicted of being a vagrant under this statute, she must be so convicted, not merely on her confession, or on competent testimony that she is a common prostitute or an idle person, or that she is both a common prostitute and an idle person. This statute does not declare common prostitutes as a class or by name to be vagrants, nor does it declare all idle persons to be vagrants, but *only such idle persons as live without employment, and yet have no means to maintain themselves.* By an act passed Jan. 23, 1833, which from its title and provisions would appear to be confined in its operations to the city of New York, "all common prostitutes who have no lawful employment whereby to maintain themselves," are declared vagrants. It is presumed that the prisoner, Catharine Forbes, was arrested and convicted under this act; but by this act common prostitution is neither defined nor declared to be a crime. By the act a certain class or description of common prostitutes are declared to be vagrants. Every word which defines this class or makes a part of this description, is material and important.

The magistrate, in acting under the act, has no right to drop, or disregard one word of that description. He has no right, I think, to say or determine that a common prostitute is a vagrant within this act, merely because she is also idle or an idle person, without proof of any other fact or circumstance. To be a vagrant within the act, the common prostitute must be without any *lawful employment whereby to maintain herself.* These words imply, I think, something more than being idle, or in an idle condition; and probably something more even than habitual idleness. They imply, I think, a want of any lawful business, occupation or means whereby to maintain herself. It is plain that substantially the same words as used in the Revised Statutes in describ-

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ing the kind or class of idle persons declared to be vagrants, mean something more than mere idleness, otherwise the statutes would have declared all idle persons to be vagrants. The object of this act is not to punish common prostitution as a sin or moral evil, or to reform the individual, but to protect the public against the crimes, poverty, distress and public burdens, which experience has shown common prostitution causes or leads to.

These statutes declaring a certain class or description of persons vagrants, and authorizing their conviction and punishment as such, as well as certain statutes declaring a certain class or description of persons to be disorderly persons, and authorizing their arrest as such, are in fact rather of the nature of police regulations to *prevent* crime and public burdens and charges, than of the nature of ordinary criminal laws prohibiting and punishing an act or acts as a crime or crimes.

If the condition of a person brings him within the description of either of the statutes declaring what persons shall be deemed vagrants, he may be convicted and imprisoned, whether such condition is his misfortune or his fault. His individual liberty must yield to the public necessity or public good; but nothing but public necessity or the public good can justify these statutes, and the summary conviction without a jury and in derogation of the common law authorized by them. They are constitutional, but they should be construed strictly, and executed carefully in favor of the liberty of the citizen. Their description of persons, or classes of persons, who shall be deemed vagrants, is necessarily vague and uncertain, giving to the magistrate in their execution an almost unchecked opportunity for arbitrary oppression or careless cruelty. The main object or purpose of the statute should be kept constantly in view, and the magistrate should be careful and see, before convicting, that the person charged with being a vagrant is shown either by his or her confession, or by competent

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testimony, to come exactly within the description of one of the statutes. (*See opinion of EDMONDS, Circuit Judge, in the People agt. Phillips, 1 Park. Cr. R., 95, and the authorities there cited; Morris agt. The People, id., 441.*) In this case there is not the least ground for supposing that the committing magistrate's proceedings were not in good faith, and with the sole view of conscientiously discharging his duty. But no record of the conviction has been produced, and by an affidavit made in this matter, it appears probable that none has been filed in the office of the clerk of the court of sessions, as required by the act of 1853, and the act of April 10, 1855, amending it; and I can therefore only look to the warrant of commitment to see whether the prisoner was lawfully convicted of being a vagrant, or of any crime or offence. For the reasons above stated, I think the commitment on its face does not show that the prisoner was lawfully convicted of being a vagrant, or of any other offence or crime. No statute of this state has yet declared common prostitution or idleness to be a crime, and I think, for the reasons above stated, that the determination of the committing magistrate that proof that the prisoner was a common prostitute and idle person, authorized her conviction of being a vagrant, was erroneous.

The prisoner, therefore, must be discharged.

It will not be necessary to examine the other question raised in this matter, to wit, whether the prisoner be discharged on the ground that no record of conviction has been filed, as required by the acts before referred to.

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UNITED STATES CIRCUIT COURT.

THE NORWALK BANK agt. ADAMS EXPRESS COMPANY.

Where an *express company*, as a common carrier, took from a person a *promissory note*, to be transmitted to a *bank* for discount, with directions to bring back the proceeds to him, accompanied by a letter from such person to the cashier of the bank to return the proceeds of the note to him by the *express company*, the company, on delivery of such proceeds to such person, *held, not liable*, although it turned out that the recipient of the proceeds stole the note, and falsely represented himself as the maker and owner of it.

There was no promise or duty that could be raised, either express or implied, that the *express company* would deliver the proceeds of the note to the genuine person, the real maker of the note, who it appeared was a stranger to the company, and had no connection with the transaction.

Besides, it appeared that the person who procured such note to be discounted, and the proceeds to be thus returned to him, had, before sending the note, *altered it*, whereby it became a *forged note*, and not obligatory at all upon the real maker; *held*, that it would be an alarming and dangerous doctrine to lay down that a common carrier is responsible for the conveyance of *forged paper*.

Before NELSON, Circuit Judge, and SHIPMAN, District Judge, at Connecticut, September, 1860—Jury trial.

HENRY DUTTON and Mr. CARTER, for plaintiffs.

RALPH J. INGERSOLL, CLARENCE A. SEWARD and SAMUEL BLATCHFORD, for defendant.

In December, 1859, F. A. Williams, of the city of New York, sent a note, at three months, for \$3,000 to the Norwalk Bank, at Norwalk, Conn., to be discounted. The cashier returned the note to Williams through the mail, with a letter stating that the note had too long to run, and that if he would make it a two months' note the bank would discount it. That letter was advertised by the post office in New York. One J. S. Williams called for the letter, and obtained it. Acting upon the suggestion of the cashier, he altered the note to a two months' note, and then took it to the Adams Express Company in New York, and representing himself to be F. A. Williams, gave the note to the company to be transmitted to the Bank of Norwalk,

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and directed the company to bring back the proceeds to him. He also wrote a letter to the cashier, requesting him to return the proceeds by the express company, and signed the letter "F. A. Williams." That letter he gave to the express company, who forwarded it to the bank with the note. The bank discounted the note, and gave to the express company its proceeds (less \$1.50 express charges), amounting to \$2,971, in a package addressed "F. A. Williams, New York city." The bank took from the company a receipt for the money, and paid the company \$1.50 out of the proceeds of the note for express charges. The money was returned to New York, and there delivered by the company to J. S. Williams. On the discovery of the fraud the bank brought an action against the express company, in a state court in Connecticut, to recover the money. The action was removed by the company into the federal court.

The bank claimed that by the receipt of the \$1.50, and by the giving of the receipt for the money, the express company had undertaken to deliver the money to F. A. Williams, to whom the package containing the money was directed. It also claimed that the officers of the bank did not observe the letter accompanying the note, and that the express company was guilty of negligence in not discovering the fraud, and that it was an insurer of the genuineness of the paper which it carried for collection, and that the bank had acted upon the faith of the directions given by the express company to the bank, to transmit the money for the note through it to New York. The cause came on to be tried before Judges NELSON and SHIPMAN, and a jury, at Hartford. After the evidence was in, the court requested the counsel for the plaintiffs to state the legal grounds upon which they relied to recover. After argument, NELSON, C. J., stated that the court were of opinion that the question involved in the case was wholly a question of law, as there was no dispute as to the facts, and he proceeded to deliver the opinion of the court, substantially as follows:

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"It is agreed, at least the facts warrant the conclusion, that both these parties, both the bank and the carrier, are innocent parties, so far as regards this transaction; equally innocent, perhaps. And the question is, which of the two innocent parties must suffer the loss. This will depend upon the application of some dry rule of law to the admitted facts of the case.

"Now, the obligation that is charged upon the carrier by the bank is this, that he received the proceeds of the note and undertook to deliver them to F. A. Williams, the maker of the original note, the genuine F. A. Williams. This is the undertaking set out and charged upon the carrier, and it is the breach of that duty or undertaking upon which is founded the claim to recover the loss. The ground of the action against the carrier is the breach of duty in not delivering the proceeds of the note to the genuine F. A. Williams, according to the undertaking; that the carrier violated his duty in delivering to the fictitious F. A. Williams, instead of the genuine F. A. Williams.

"It appears that the carrier had no knowledge of the F. A. Williams, who was the maker of the original note, and had no knowledge that he was in any way connected with the transaction, and had no knowledge that there were any transactions existing between him and the bank. So far as it respects the carrier, as connected with the transaction, F. A. Williams, the original maker of the note, was a perfect stranger. The note was delivered to the carrier by a person representing himself by the name of F. A. Williams. He was in possession of the note, and when he delivered it to the carrier, representing himself to be F. A. Williams, he at the same time wrote a letter directed to the cashier of the bank, subscribing his name, "F. A. Williams," to it. This note and this letter he delivered to the carrier for the purpose of conveyance to the bank, with the view to the note's being discounted, and with directions to bring back the proceeds, provided the

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note was discounted. The note was received by the carrier in the usual way, and the only connection that the carrier had with the transaction was as a carrier of the package. The package, containing the note and the letter, was delivered to the bank. The bank received it, and upon the faith of the note, discounted it and delivered the proceeds, according to the direction, to the carrier, to be remitted back to the person who employed the carrier.

"Now how, upon this state of facts, can a duty or an undertaking be predicated on the part of the carrier to deliver these proceeds to F. A. Williams, the original maker of the note, a stranger to the company, of whom they had no knowledge, and for whom they had transacted no business. He was not their employer in the transmission of the package to the bank. We are unable to see how, upon this state of facts, a promise or a duty can be raised, either express or implied, that they would deliver these proceeds to a stranger whom they never knew, and who had no connection with the transaction.

"It seems to us, that upon the facts as they appear, the note being delivered to the carrier, accompanied by a letter, by a person representing himself to be F. A. Williams, to be carried to the bank by the carrier, and delivered there, the whole employment being performed according to the undertaking, the bank receiving the paper signed by the man representing himself to be F. A. Williams, discounting it, and returning the proceeds to the company; it seems to us that, upon that state of facts, the only implied undertaking on the part of the carrier, would be an undertaking to deliver the proceeds to the person who employed the carrier.

"The company must have naturally supposed and believed that the bank and this person who delivered this note to them understood each other. The bank having discounted the note and sent back the proceeds according to the directions, the carrier must have supposed that it was a fair and

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ordinary transaction, and one in which the bank and this person understood each other. Therefore, the duty raised by implication was to deliver the proceeds to the person who had sent the note to the bank, and who had procured the discount of the note.

"As respects this letter, if it is of any importance at all, it seems to us that the most material fact is, that the carrier performed his whole duty in regard to it. The letter was delivered to the bank. Their omission to notice it, whether from neglect or carelessness or misfortune, is certainly not to be charged upon a carrier who has performed his whole duty with respect to it. If, therefore, it is a material fact to influence the court in their judgment, we are bound to assume that the bank had full knowledge of the letter accompanying the note; and with respect to the indorsement upon the back of the package delivered to the bank, without regard to the purpose for which it was put on, it was the authority that the proceeds should be delivered to the express company. The letter directing that the proceeds should be returned by the carrier was the authority from the person who wrote the letter.

"We are of opinion, therefore, that on the facts of the case, looked at simply with reference to the application of the rule of law that should determine the rights of the parties, no duty or promise can be raised or implied on the part of the carrier to deliver the proceeds to F. A. Williams, the original maker of the note, the genuine F. A. Williams; but that, on the contrary, the only duty or promise that can be raised upon these facts against the carrier, was to deliver the proceeds to the person who employed the carrier.

"But there is another view of this case, which is independent of the view we have taken, and that is this: after the alteration of the note by the pretended F. A. Williams, it was no longer the note of the genuine F. A. Williams. It was a forged note. F. A. Williams was not under any obligation by virtue of his signature to that note. As it

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respected him, it was the same as a note entirely fabricated, for three thousand dollars, payable in two months. It was, therefore, a forged note, delivered by the guilty party to the carrier, to be conveyed by it, as carrier, to the bank for the purpose of discount. That note was taken to and received by the bank, and on the faith of itself was discounted, and the proceeds were returned. Now, is the carrier responsible for the conveyance of forged papers? Is the carrier an insurer of the genuineness of all papers that are put into his hands for the purpose of transmission or conveyance? We think not. This would be an alarming doctrine to lay down, as it respects the common carrier. This business, carried on through the medium of express companies, has become a very extensive business. The common carrier is only a mode of communicating with banks, transmitting notes for discount, and carrying back their proceeds. The carrier has no earthly interest in such transaction, but as a mere vehicle of conveyance; is not connected at all with the party procuring the discount, or with the bank; does not influence the bank to discount the paper, and makes no representations in that regard; and the bank knows that the carrier has no other connection with the paper than as a mere vehicle of conveyance. It would be a very strange doctrine to hold that, under such circumstances, the carrier should be responsible to the bank for the genuineness of the paper; that the mere carrying of it, the mere conveyance of it from the party employing the carrier to the bank, should operate as a guarantee of the genuineness of all the paper put into the hands of the carrier for conveyance. That principle cannot be sustained. Now, that is this case. The note here was as much a forged note as if it had been fabricated throughout. There was no obligation on the part of F. A. Williams, the original and genuine maker of it, under the alteration. It must be regarded, therefore, as forged.

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"We are quite clear that the case has not been made out on the part of the plaintiffs, and that the defendant, is entitled to a verdict."

The jury found a verdict for the defendant.

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NEW YORK COMMON PLEAS.

BALL agt. MANDER.

Where a plaintiff resides out of the city of New York, he may bring his action before *any justice* of the district courts in the city; and, in such case, the summons must be served not less than two days before the time for appearance mentioned in it: a service on the 14th returnable on the 16th, is good.

Where the defendant said, when he received the summons, he put it in his pocket and *forgot it* until the time of its return had passed; *held*, not a good excuse for granting a new trial, especially where the court could see that he had no substantial defence.

New York General Term, September, 1860.

Present, DALY, BRADY and HILTON, Judges.

By the Court, HILTON, Judge. From the affidavits presented on this appeal, it does not appear that the defendant has satisfactorily excused his neglect to attend the trial before the justice, nor that he has a substantial defence to the action.

The defendant had nearly two full days to read the summons served on him to ascertain when it was returnable, and the only reason he gives for not doing so obvious a duty to himself is, that when it was received he put it in his pocket and forgot it until the time of its return had passed. It may be said that this neglect is accounted for by the fact stated in the affidavit of the person making the service, that it was made while the defendant was playing cards in a drinking saloon. But if this was the case it does not present such an excuse as we should consider satisfactory. At most it shows that he gave more of his attention to the reading of his cards than to examining the process of the court.

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As to the defence desired to be interposed, it does not seem to me to be one that would prevail should a new trial be afforded him. The suit was to recover commissions for procuring a purchaser for his house, and in addition to the evidence before the justice, that the purchaser thus procured was one Kempf, we have now the fact before us, that the conveyance by the defendant is upon record, to Kempf, and not to Denner, who makes an affidavit in the plaintiff's behalf, stating that he alone was the purchaser.

Respecting the questions presented in the notice of appeal as to the jurisdiction of the justice, and the sufficiency of the summons, it is only necessary to remark, that § 4 of the district court act permits an action to be brought before any justice where the plaintiff, as was the case here, resides out of the city of New York (*see also* § 80 of *same act*), and by § 13, the summons in actions where the plaintiff is such non-resident, must be served not less than two days before the time for appearance mentioned in it.

The return shows that the summons was served on the 14th of April, returnable on the 16th, and the law does not regard fractions of a day in computing the time for the service of process, notices or pleadings in a cause. (*Columbia Turnpike Road* agt. *Haywood*, 10 *Wend.*, 422.) Judgment affirmed.

SUPREME COURT.

JOHN TINDALL agt. SARAH V. JONES, administratrix, &c., of JOHN S. JONES, deceased.

Where an action commenced against a defendant who dies *per dente life*, is revived and continued against his personal representatives, the plaintiff, on recovery of judgment, is entitled to *costs*, the same as if the defendant had survived, and that whether or not any demand of payment had been made upon the executors or administrators, or any refusal by them to refer the claim, or without any motion to the court for such costs. The case does not come within § 41 of the Revised Statutes. (*The several conflicting decisions on this question examined.*)

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Dutchess General Term, May, 1860.

Present, LOTT, EMOTT and BROWN, Justices.

THIS was an appeal from an order made by Judge LOTT, denying a motion of the defendant to set aside or modify the judgment entered in the action on the 21st of September, 1859, by striking out or vacating all of said judgment awarding costs to the plaintiff, upon the grounds that said judgment for costs was entered without motion to the court therefor, and without leave granted by the court; and because the claim involved in the suit was never presented to nor refused by the said administratrix; and because no offer to refer was ever made to her, nor did she refuse to refer the same; and because the plaintiff was not entitled to costs.

The action was originally commenced against John S. Jones, on the 9th February, 1857, in his lifetime, to recover \$180 and interest, for work, labor and services. Issue was joined by the service of defendants answer on the 3d of March, 1857; the defendant, John S. Jones, died on the 1st day of May, 1857, and Sarah V. Jones, his widow, was duly appointed his administratrix, who advertised, according to the statute, for claims to be presented against the estate. The plaintiff never presented his claim in this action to said administratrix, nor was she ever asked, nor did she ever refuse to refer the same under the statute; and the claim was not unreasonably resisted or neglected by the administratrix. On the first Monday in October, 1858, the plaintiff presented an application, and obtained leave of the court to file and serve a supplemental complaint to revive and continue the action against said administratrix. Issue was joined upon the supplemental complaint on the 2d September, 1859. The trial was had at the Westchester circuit, in September, 1859, and the plaintiff obtained judgment, and had his costs taxed by the clerk of Westchester, and inserted in the judgment, after objection made by the defendant's counsel upon the grounds above stated.

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On appeal by defendant to the special term, Judge Lorr gave the following decision: " Motion denied, with \$10 costs. Order to be entered in Westchester county. This case does not, in my opinion, come within the 41st section, title 3, ch. 6 of part 2 of the Revised Statutes (vol. 2, p. 90), and I adopt the opinion of the superior court in *Benedict agt. Caffee* (3 *Duer*, 669), and of the supreme court in *Lemon agt. Wood* (16 *How. Pr. R.*, 285), in preference to that of the latter court in *McCann agt. Bradley* (15 *How. Pr. R.*, 79), and as being a correct construction of the statute on the question."

Wm. M. SKINNER and ROBERT COCHRAN, for appellant, presented and argued the following points:

I. The award of costs of the plaintiff was improperly inserted in the judgment in this action, because no rule allowing them had first been obtained, as is necessary in every action against administrators, costs not being recoverable against them of course. (5 *Wend.*, 74; 9 *id.*, 448; 12 *id.*, 355.)

II. Under the provisions of the Revised Statutes with reference to costs against administrators, the plaintiff not having presented his claim, and there being no unreasonable delay or refusal to refer, and the application to revive not being made until after the advertisement for claims had expired, he cannot recover costs in this action against the administratrix. (2 *R. S.*, 90, § 41, 5th ed., p. 176, § 46; *Bullock agt. Bogardus*, 1 *Denio*, 276; 3 *id.*, 361; 6 *Wend.*, 554.)

III. The statute clearly applies to the present case, and is not confined solely to cases commenced originally against administrators, as supposed in the cases in 3 *Duer*, 669, and 16 *How. Pr. R.*, 285. The language of the statute *expressly* extends its application to such cases. After the words, "in *such* cases no costs shall be recovered against the defendants;" referring to these cases commenced against administrators, it continues, "nor shall any costs be recov-

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ered in any suit at law against any executors or administrators, unless it appear," &c.

IV. The true construction was given to this statute in its application to cases like the present by the supreme court of the first district at general term, in the two cases of *McCann agt. Bradley* (15 *How. Pr. R.*, 79), and *Thompson agt. Bullock's Administrators*, referred to in 16 *How. Pr. R.*, 213. (*See also* § 317 of the Code.)

V. In the great uncertainty of the practice upon this question, which was increased by the conflicting decisions of the supreme court at general term, the defendant's estate should not have been charged with the costs of the motion, and if this court does not sustain her position, she should not be made to pay the costs of the appeal.

FRANCIS LARKIN, *for plaintiff, respondent.*

By the court, EMOTT, Justice. There have been various and contradictory decisions upon the question presented by this appeal. In *McCann agt. Bradley* (15 *How. Pr. R.*, 79) the general term in the first district held that an action commenced against a defendant in his lifetime, and revived against his personal representatives after his death, was within the 41st section of title 3, ch. 6, part 2d of the Revised Statutes; and costs could not be recovered unless the claim had been presented to the personal representatives, or a reference refused, which is in effect to say that in such an action they could not be recovered at all. In *Haight agt. Hayt*, which is not reported on this point, the general term in this district had previously made the same ruling. This case went to the court of appeals, but it was upon the merits, and by an appeal by the defendants, and the question of the plaintiff's right to costs was not presented to that court. The plaintiffs, however, were allowed their costs of both the appeals in the same action, that from the circuit to the general term, and that from this

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court to the court of appeals. This was understood to have been permitted upon the ground that an appeal was in the nature of a new action, and that the executors having appealed from the judgment against them ceased to be defendants, or persons against whom an action was brought in the sense of the statute. On the other hand the general term of the sixth district, in *Lemon* agt. *Wood* (16 *How. Pr. R.*, 285), and the full bench of the superior court, in *Benedict* agt. *Caffe* (3 *Duer*, 669), took a directly opposite view of the question. In the latter case, in particular, Judge Slosson discusses the question at large in a well considered opinion. In this state of the authorities we feel at liberty to treat the question as open, and to reconsider the decision in this district, especially as it has never been reported, and is sustained by no opinion.

The provisions of the Revised Statutes form a system which is complete in itself in regard to the settlement of estates and the collection of demands against them. The section in question is part of that system, and is intended to give to executors and administrators notice of a demand made upon them, and an opportunity to admit it and agree to its payment in the course of administration, or to try its validity in a cheap and easy mode, if it depend altogether upon questions of fact; but in cases like the present the intestate has in his lifetime the opportunity to elect whether he would pay or resist the claim. He elects to defend, puts the party making the claim to a suit, and may put him to the trouble and expense of a litigation in all stages, perhaps including several trials, down to its final result. He dies, it may be, just before that result is reached, and the effect is said to be that the plaintiff must lose his right to the costs already incurred, and go on at his own expense for all the proceedings in the suit, past and to come, or relinquish his prosecution, pay his costs already incurred, and then exhibit his claim like every other creditor *de novo* under the statute. That might be the case if

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the suit finally abated, and could not be revived, although even then it would be highly unjust. But since the action does not abate, but is continued, it is not easy to see how the plaintiff is to be deprived by the change of parties of his right to costs, which are one of the incidents of the suit, and depend upon no other contingency than final success. I exclude of course from this remark the effect of the action of the legislature while the suit is pending. The effect of the death of the original defendant, the partial abatement in consequence, and subsequent revivor of the action is only to substitute new parties. The personal representatives are put in the place of the deceased, just as the assignors of a bankrupt are substituted for him. The interest is changed, but the cause of action and the action itself survive. There is no abatement in strictness and reality, but merely a temporary defect of parties in consequence of the death of the defendant and the transmission of his interest. In analogous cases in the former practice of the court of chancery, the action was not so suspended even before it had been revived against the personal representatives, but that some proceedings could be had in the mean time, as a motion to dismiss for want of prosecution, or an application for a receiver and the like. The representatives of a deceased defendant come into his shoes in all respects. They become defendants to a suit against him, not an action which has been brought against them; and the action must proceed against them as it would have done against him. If in the final event it turns out that the plaintiff recovers a judgment, which would entitle him to costs had the original defendant survived, he has the same right against his legal representatives and successors, and the 317th section of the Code directs how that judgment shall be entered and enforced.

Nor is it necessary to make an application to the court for leave to enter a judgment for the costs in such a case. Such an application is only necessary when the award or

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refusal of costs rests in the power or discretion of the court, or at least depends upon something else than a positive direction of statute. In cases where the action is brought against executors or administrators, no costs are recoverable unless the plaintiff has, before bringing the action, complied with the conditions of the statute, and this must be shown to the court outside the record; but when the administrator is substituted for the deceased in a pending action, as in this case, the court would have had no more to pass upon in such an application than if a similar application were made in the case of a living defendant.

The plaintiff's judgment was regular, and the order refusing to set it aside must be affirmed, but considering the conflicting character of the decisions, without costs.

LOTT, Justice, concurred; BROWN, Justice, dissented.

NEW YORK SUPERIOR COURT.

In the Matter of ISRAEL KAHN.

A person residing in the city of New York, and *taxed upon his personal property, may be punished as for a contempt, on account of his neglect to pay it.*

Where the *commitment* specified and declared that the court of common pleas "has adjudged that said Israel Kahn is guilty of the misconduct herein specified, to wit, the neglect by him, said Kahn, to pay the personal tax assessed, imposed and confirmed against him for the year 1859, and that he stand committed to the jail of the city and county of New York, there to remain charged upon the said misconduct until he shall have paid said tax" (stating the amount); *held, that the contempt was specially and plainly charged in the commitment pursuant to the statute.*

The court of common pleas of the city and county of New York have *authority, under the statutes, to commit for such contempt; and no court or officer who is forbidden by law to review the accuracy of the decisions of the common pleas, on a proceeding by habeas corpus, can discharge the individual in contempt from custody.*

New York Special Term, September, 1860.

HABEAS CORPUS to discharge from custody said Israel

Matter of *Israel Kahn*.

Kahn, committed for contempt for the non-payment of personal taxes.

TOWNSHEND and LEVINGER, for Kahn.
HENRY MORRISON, for tax receiver.

Bosworth, Ch. Justice. Israel Kahn has been brought before me on a *habeas corpus*, and the sheriff of New York, in whose custody he is, returns that he detains him by virtue of a writ or process of commitment, issued by the New York common pleas, which he produces, and a copy of which is made part of his return. It is insisted that this writ is void on its face. The writ is in the name of the people of the state; it is tested in the name of the first judge of the court, is sealed with the seal, and purports to be issued by order of the court, and is signed by its clerk.

The writ recites that the court of common pleas, on the 21st of Sept., 1860, in the matter of the application of James Kelly, receiver of taxes in the city of New York, as applicant, and Israel Kahn, as respondent, "to enforce payment of the personal tax assessed and confirmed against" the said Israel Kahn, for the year 1859, "by reason of the matter alleged in the application of the said James Kelly, receiver, as aforesaid, duly verified, as well as by reason of the failure of the said Israel Kahn to show the court satisfactory and sufficient reason as defence or excuse of the matters alleged in said application" adjudged said Kahn guilty of the misconduct in said application alleged, to wit, "the neglect by him, said respondent, to pay the personal tax assessed, imposed and confirmed against him for the year 1859;" that this misconduct prejudiced, &c., the rights of said applicant; that Kahn stand committed to jail upon said misconduct, there to remain until he paid said tax, being \$98.41, and the costs and expenses of said proceeding being \$26.30, in all \$124.71, and that a warrant issue for that purpose. The writ then requires the sheriff to

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arrest and detain Kahn in jail, until he pays the \$124.71, and the sheriff's fees on such writ, or until the said court of common pleas makes an order to the contrary.

The Revised Statutes (2 R. S., 567, §§ 41, 56), declares that it shall be the duty of the court or officer, before whom a party shall be brought on *habeas corpus*, forthwith to remand such party, if it shall appear that he is detained in custody (among other enumerated causes) "for any contempt specially and plainly charged in the commitment, by some court, officer or body having authority to commit for the contempt so charged, and that the time during which such party may be legally detained has not yet expired."

The questions therefore are, *first*, can a person assessed or taxed by reason of his personal property be committed as for a contempt, on account of his neglect to pay such tax; and, *second*, is such a contempt specially and plainly charged in the commitment in question; and, *third*, has the said court of common pleas authority to commit for such a contempt.

The act of April 12, 1842 (*chap. 318*), declares that "the neglect or refusal to pay such a tax according to the law shall be held and deemed to be *a neglect or violation of duty or misconduct*, within the provisions of title 13, of chap. 8, of part 3, of the Revised Statutes."

That title declares that "every court of record shall have power to punish, by fine and imprisonment, or either, any neglect or violation of duty, or any misconduct, by which the rights or remedies of a party in a cause or matter depending in such court may be defeated, impaired, impeded or prejudiced" in the cases enumerated in that title.

The act of 1842 (*supra*), therefore makes the neglect to pay a personal tax a misconduct or violation of duty, which may in some cases be punished by fine and imprisonment, or either.

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The act of April 18, 1843 (*chap. 23*), entitled "an act for the collection of taxes in the city of New York," provides (*p. 320, § 12*) that "in case of the refusal or neglect of any person to pay any tax imposed on him for personal property," the receiver of taxes in the city of New York, when such a state of facts exists as that section specifies, may "make application, within one year, to the court of common pleas of the county, or to the supreme court, to enforce payment of such tax." Section thirteen of the same act declares that "the court may impose a fine for the misconduct * * * sufficient in amount for the payment of the tax assessed, and of the costs and expenses of the proceedings authorized by this act to enforce such payment, or punish such misconduct," &c., &c.

It follows, that a person residing in the city of New York, and taxed upon his personal property, may be punished as for a contempt, on account of his neglect to pay it. Whether, in this case, the decision was right or wrong upon the merits, I cannot inquire. If the commitment specially and plainly charges a contempt for misconduct of this character, and shows that the court of common pleas of this county has adjudged that the said Kahn be committed for it, the statute makes the remanding of Kahn an imperative duty.

The commitment specifies and declares that the court of common pleas has "adjudged" that said Israel Kahn is "guilty of the misconduct" therein specified, to wit, "the neglect by him," said Kahn, "to pay the personal tax assessed, imposed and confirmed against him for the year 1859," and that he "stand committed to the jail of the city and county of New York, there to remain charged upon the said misconduct until he shall have paid" said tax, being \$98.41, and the costs and expenses of the proceedings, being \$26.30, and that a warrant issue for that purpose.

Whatever of informality there may be in the language of the commitment, it is specially and plainly charged in

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the commitment that the common pleas has adjudged him guilty of the misconduct defined by the statutes of 1842 and 1843, and has also adjudged that he be imprisoned until he pay two specified sums, and that a warrant issue to carry such adjudication into effect.

The court of common pleas must, therefore, be regarded as having disposed of every question affecting the merits of the proceeding, as it has made a final determination that the neglect of Kahn to pay his personal tax was a misconduct within the meaning of these statutes, and was unexcused.

To this view there is no answer, except such as is found in the argument that the act of 1842 is, as to the county of New York, repealed by the act of 1843.

Section one of article four, of the act of 1843 (p. 328), declares certain provisions of the Revised Statutes inapplicable to the city and county of New York; and § 2 (p. 328) repeals all acts inconsistent with the act of 1843.

The act of April 12, 1842 (*chap.* 318) is no part of the Revised Statutes, and no part of it is inconsistent with the act of 1843 (*chap.* 230), except that by the act of 1842, the application to the court to enforce payment of a personal tax is to be made by an "assessor," whereas by the act of 1843, it is to be made in the city of New York, by the receiver of taxes.

The part of section two of the act of 1842, above quoted, is general, and applies to the whole state; and if not inconsistent with the act of 1843, is not repealed by it.

Instead of being necessarily inconsistent with the act of 1843, the existence of its provisions seems to be essential to clear authority in the common pleas to commit a party to jail for such misconduct as is charged in this case. For it must be observed that sections 12 and 13 of the act of 1843 (p. 320), do not in terms confer any power to punish, nor prescribe how the fine that may be imposed is to be collected.

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I deem it quite clear, therefore, that no court or officer who is forbidden by law to review the accuracy of the decision of the common pleas, on a proceeding by *habeas corpus*, can discharge Mr. Kahn from custody. Sitting as an officer, having only such powers as were formerly exercised by a supreme court commissioner, the statute is imperative that I must remand the prisoner to the custody of the sheriff, as it appears by the return of that officer, that he detains him in custody by virtue of a writ of commitment from the court of common pleas of this city and county, for a contempt (within the meaning of the word contempt as used in the statute), specially and plainly charged, by a court having authority to commit for the contempt so charged.

A contempt within the meaning of that word, as used in this statute, embraces all kinds of misconduct which, under title 13 of chap. 8, part 3 of the Revised Statutes, may be punished by fine and imprisonment.

Section 2 of the act of 1842, declares that the neglect or refusal to pay a personal tax, according to law, shall be held and deemed to be misconduct within the meaning of said 13th title, and that such misconduct may be punished in the same manner and with like authority as provided in that title.

The petitioner must, therefore, be remanded to the custody of the sheriff.

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SUPREME COURT.

EZRA R. HALL, respondent, agt. JOHN S. SAMSON, appellant.

It is well settled that under our statutes, a *mortgagor of goods* has no property in them subject to levy and sale on execution, *unless he has a right to the possession of them for a definite time*; and that a *mortgagor in possession of a chattel after forfeiture*, or when the *mortgagor may take possession at his pleasure*, has no interest which is the subject of sale on execution.

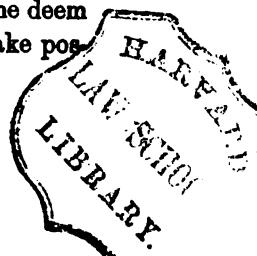
It is equally well settled that a *mortgagor of a chattel in possession*, with the *right of possession for a time certain*, has an interest which may be sold on execution. This *right of possession* incident to the ownership, is the proper subject of an *agreement between the parties*, and the legal effect of the mortgage may be restrained or modified by such agreement. The mortgage must be interpreted by the same rules which govern the construction of other contracts, and the intent of the parties, as declared in the mortgage, must be carried into effect; and in this, as in other cases, an agreement may be *implied*, as well as expressed in terms.

Where a *chattel mortgage* contains a provision to the effect that in case of non-payment of the amount secured at the time limited for the payment thereof, then the *mortgagor* shall have full power to enter upon the premises of the *mortgagor*, or any other place or places where the goods and chattels may be, to take possession of and sell the same, &c.; and in case the *mortgagor shall at any time deem himself unsafe*, it shall be lawful for him to take possession of such property and to sell the same, &c.

Held, that the very terms of the mortgage and the authority given to enter, upon breach of the conditions, on the premises of the *mortgagor*, and take possession of the property, clearly imply that until that time the goods are to remain in the *possession of the mortgagor*. Therefore, until a *default* in the payment of the mortgage debt, or until a *demand* of the goods by the *mortgagor*, under the clause of *insecurity*, the property is liable, and the interest of the *mortgagor* therein may be sold on execution.

Fifth District, Syracuse General Term, October, 1859.

THIS action was commenced December 25, 1858. The plaintiff claimed to recover the value of a piano, taken by the defendant as sheriff of the county of Cortland. The mortgage was given by Matthew F. Walpole to the plaintiff on the 8th of May, 1858, to secure the payment of the sum of \$700, *payable in one year from date*, and containing the usual clause, that if the *mortgagor* should at any time deem himself *insecure*, he was authorized to enter and take possession of said property, &c.



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The piano was taken by the sheriff—the defendant, by virtue of an attachment issued out of the supreme court by Jaycox and Green, plaintiffs, against Matthew F. Walpole, defendant—June 29, 1858, and was sold on execution in the same case, December 8, 1858, before the mortgage debt became due, and before the mortgagee had reduced the property to possession. The mortgagee, although informed of the levy, did not demand the piano of the sheriff before the suit, nor did he claim to take it under the insecurity clause in the mortgage. The cause was referred to Hiram Crandall, Esq., referee, and was defended on the ground that Walpole had a possessory interest, which was subject to levy; the referee found for the plaintiff \$75, for which judgment was entered. Defendant thereupon appealed to the general term.

HUNT and FRYER, for appellant.

W. WILLOUGHBY, for respondent.

By the court, W. F. ALLEN, Justice. By statute (2 R. S., 366, § 20), when goods or chattels shall be pledged for the payment of money or the performance of any contract or agreement, the right or interest in such goods of the person making such pledge, may be sold on execution against him, and the purchaser shall acquire all the right and interest of the defendant, and shall be entitled to the possession of such goods and chattels on complying with the terms and conditions of the pledge. The revisers, in their note to this section, say: "It seems to be conceded (5 J. R., 345; 4 Cow., 469) that goods bailed or assigned cannot be sold, although the authorities leave the point open to much inquiry. It is submitted that the opportunity thus given to fraud, and to the injury of creditors, should be avoided. No possible evil is apprehended from extending the same principle which prevails here in relation to real estate, to personal property." (3 R. S., 727, 2d ed.) The case in 5

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Johnson (*Wilkes* agt. *Ferris*) decided that the resulting trust or residuary interest remaining to the assignor of personal property after the purposes of an assignment for the payment of debts are satisfied, is not such an interest as can be taken and sold on execution; and the case in *4 Cowen* (*Marsh* agt. *Lawrence*) was to the effect that an equity of redemption in goods under a transfer, in the nature of a mortgage, could not be taken and sold on execution. Neither of these were cases of strict pledge, and yet from the language of the revisers, it would seem that they had it in view in reporting the section to remedy a supposed defect in the law resting upon these cases, or resulting from the principle there decided. Their idea was to extend to personal property the same principle which prevailed as to real estate. In this state, and under an act concerning judgments and executions, an equity of redemption in real estate could at that time, as it still may be, sold under an execution at law. (*Waters* agt. *Stewart*, 1 C. C. in *Er.*, 47; *Jackson* agt. *Town*, 4 *Cow.*, 601, *per* *WcodWORTH*, J.; 7 *id.*, 78.) As the law stood at the time of the revision, an equity of redemption, the mortgagee being in possession, a reversion and kindred interests might have been sold on execution. (*Per GARDINER*, J.; *Stief* agt. *Hart*, 1 *Comst.*, 32.) The term pledge applied to chattels in its strict sense, denotes a bailment or actual delivery of goods by a debtor to his creditor, to be kept till the debt is discharged. It is the delivery of a thing for the security of some engagement, and is distinguished from a mortgage, which is a grant or conveyance of the goods, and by it the whole legal title passes conditionally to the mortgagee. Pledge, in its proper sense, when applied to goods, does not comprehend a mortgage; but the reverse is not quite true, for a mortgage of goods is a pledge and more, for it is an absolute pledge, to become an absolute interest, if not redeemed at the specified time. (*Per COWEN*, J., *Brown*, agt. *Bement*, 8 *J. R.*, 96.) As to real property a mortgage

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might perhaps be more properly called a pledge. A mortgage, as in use with us, is but *mortuum vadum* or a dead pledge. (2 *Bl. Com.*, 157.) Before actual forfeiture, when the property or chattels mortgaged become the absolute property of the mortgagee, and liable to execution for his debts, there is no reason why they, or the interests of the mortgagee in them, irrespective of the right of possession, should not be liable to execution against the mortgagor, which would not apply with equal force to pledges. It is true that the revisers were, critically, accurate lawyers, and well understood not only the technical meaning of the words they employed, but the importance of using the right word in the right place, so that the strong presumption would be that by the word pledge, when used by them, was intended a bailment, a *strict* pledge, still there is much in the circumstances under which the section was enacted, and the reasons assigned for, and which induced its recommendation, as well as the absence of any well grounded reason for a distinction in the case between a pledge and a mortgage before forfeiture, upon which to base a plausible argument, that the revisers and legislature intended to include within the statute, and subject to sale on execution equities of redemption, reversions and kindred interests in goods and chattels. Chancellor WALWORTH was of the opinion that it was intended by the statute to place the right to sell personal property mortgaged and continuing in the possession of the mortgagor, upon the same footing as real estate mortgaged, while it continued in the possession of the mortgagor; and he supposed that most of the members of the court for the correction of errors were of the same opinion. (*Hanford agt. Artcher*, 4 *Hill*, 277.) In *Randall agt. Cook* (17 *W. R.*, 53), Judge BRONSON was of the opinion that an action would not lie against an officer for a levy, by virtue of an execution upon personal property which has been mortgaged, and remains in the possession of the mortgagor, where the levy was made before

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the mortgage became absolute, and for authority he referred to *Wheeler* agt. *McFurland* (10 *W. R.*, 318), which was the case of a levy upon goods under an execution against the owner, while they were in the possession of one having a lien for labor bestowed upon them; the learned judge making no distinction between the equity of redemption, in the case of a mortgage, and any other interest of like nature, and making no mention of any right in the mortgagor to possession of the goods for a definite period, as forming an element in the question, and necessary to constitute an interest subject to execution. The interest of a lessee of personal property may be sold on execution, and the purchaser will stand in the place of the lessee (*Van Antwerp* agt. *Newman*, 2 *Cow.*, 543), notwithstanding the title remains in the lessor. (*Hurd* agt. *West*, 7 *Cow.*, 756.) But the statute has received a construction, and doubtless the right construction, and it is well settled that the mortgagor of goods has no property in them subject to levy and sale on execution, unless he has a right to the possession of them for a definite time, and that a mortgagor in possession of a chattel after forfeiture, or when the mortgagee may take possession at his pleasure, has no interest which is the subject of sale on execution. (*Marsh* agt. *Lawrence*, 4 *Cow.*, 467.) It is equally well settled that a mortgagor of a chattel in possession, with the right of possession for a time certain, has an interest which may be sold on execution. (*McCracken* agt. *Luce*, cited in *Marsh* agt. *Lawrence*, *supra*; *Mattison* agt. *Baucus*, 1 *Comst.*, 295; *Hull* agt. *Carnly*, 1 *Kern.*, 501, and cases cited.) I only allude to the statute subjecting a pledgor's interest in chattels to sale on execution, and the motives and decisions which led to its adoption, for the purpose of showing the leaning of legislation in favor of making every tangible and real interest, and right in personal property, liable to levy and sale on execution. The question in this case is, whether the plaintiff had the right, under the mortgage,

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to the possession of the property at his pleasure, at the time of the levy and sale by the defendant, and this depends upon the true construction of the mortgage.

In *Warner agt. Munroe*, decided by this court in January last, we held and decided that the sheriff was not liable in an action of trover for levying upon and removing to a safe place goods in the possession of a mortgagor before default in the payment of the debt secured, and before any claim by the mortgagee to the possession of the goods, until a demand of the goods had been made by the mortgagee. In deciding this we necessarily held that until the mortgagee exercised the power vested in him, under the "danger clause" in the mortgage, by obtaining or claiming the possession, for the reason that he deemed himself insecure, the mortgagor had an interest in the property, which was the subject of levy upon execution. That the right of the mortgagee to the possession of the property did not depend upon his *mere pleasure*, but upon the fact of his deeming himself insecure, which fact could only be established by his acts. That from the time he deemed himself insecure, his right to the immediate possession became absolute, and could be asserted as against any person having the actual possession under the mortgagor, but that a party could not be made a wrong doer by relation and by the mental operations of the mortgagee. The causes for that decision were assigned in opinions written by Judge MULLIN, and need not be repeated here.

Without now referring in detail to all the cases bearing upon the question, most of which can be distinguished from this, I will, before remarking upon the construction of this mortgage, refer to one or two cases which more nearly resemble this in their circumstances. In *Stewart agt. Taylor* (7 *How.*, 251, *decided at special term by Judge STRONG*), there had been a sale of the mortgaged property without the assent of the mortgagee, and before he had taken possession, or the debt had become due; and it was held that

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the sale was a conversion from which trover would lie. The judge did not consider, particularly the terms of the mortgage, but he treated it as containing no provision for the retaining of the possession of the property by the mortgagor for any time. The mortgage said nothing about possession, but was conditioned that in case of default in payment, the mortgagee might take the property and sell the same, which was considered as an authority to sell, and was consistent with the possession of the property by the mortgagee. He could, therefore, in virtue of his right of property, have taken possession of the goods at his pleasure. The condition was not like that in the mortgage in this action. The case of *Rick agt. Milk* (20 Barb., 616) was an action against the assignee of the mortgagee, who had before the mortgage debt became due, taken possession of the property under a clause in the mortgage, providing that if default should be made in the payment, or if the mortgagee should at any time deem himself in danger of losing his debt by delaying the collection thereof until it became payable, he might take possession of the property at any time before or after the time limited for the payment of such debt, and sell the property, or so much thereof as should be necessary to satisfy the debt and reasonable expenses. The condition of that mortgage, it will be seen, was essentially different from that with which we have to do, and the court held that there was no restriction by implication upon the right of the mortgagee to take possession of the mortgaged chattels at any time during the running of the mortgage, and the decision of that case unnecessarily, as I think, was put upon that ground. But as I read the condition of that mortgage, the case is not in conflict with *Warner agt. Munroe*. In *Conkey agt. Hart* (14 N. Y. R., 22) it was held by the court of appeals, where there was a provision in a chattel mortgage, that the mortgagor should remain in possession until default in payment, unless he or some other person should attempt to

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sell, assign, remove or otherwise dispose of the property, that the seizure of the property before default on a distress warrant for rent due from the mortgagor, entitled the mortgagee to the immediate possession, and that after demand and refusal, replevin would lie against the bailiff for the wrongful detention. A demand appears to have been deemed necessary, notwithstanding the breach of the condition by which the mortgagor retained the possession, that notwithstanding the default by which the right of immediate possession became absolute in the mortgagee, a right of action against a person taking the property from the possession of the mortgagor by authority of law, would only accrue upon a demand by the mortgagee and a refusal to deliver. That was the case decided, and the court nowhere intimate that a demand was not necessary. But to the mortgage in this case. The legal effect of a mortgage is to vest in the mortgagee the entire legal title to the property mortgaged, subject only to be defeated by conditions subsequent, and in the absence of any provision to the contrary, that ownership carries with it the right to the immediate possession. (*Mattison agt. Baucus*, 1 *Comst.*, 295.) This right of possession incident to the ownership is the proper subject of an agreement between the parties, and the legal effect of the mortgage may be restrained or modified by such agreement. The mortgage must be interpreted by the same rules which govern the construction of other contracts, and the intent of the parties, as declared in the mortgage, must be carried into effect, and in this, as in other cases, an agreement may be implied as well as expressed in terms. The provision in the mortgage is to the effect that in case of non-payment of the amount secured at the time limited for the payment thereof, then the mortgagee should have full power to enter upon the premises of the mortgagor, or any other place where the goods and chattels might be, to take possession of and sell the same, &c.; and in case the mortgagee should at any

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time deem himself unsafe, it should be lawful for him to take possession of such property, and to sell the same, &c. The very terms of the mortgage, and the authority given to enter upon breach of the conditions on the premises of the mortgagor, and take possession of the property, clearly imply that until that time the goods were to remain in the possession of the mortgagor. Such is the clear understanding and intent of the parties as declared by the instrument. It is a general principle, applicable to all instruments or agreements, that whatever may be fairly implied from the terms or language of an instrument, is in judgment of law contained in it. (*Rogers agt. Kneeland*, 10 *W. R.*, 218.) Again, the parties having, by their agreement, specified in terms the contingencies, upon the happening of either of which the mortgagee may take possession of the goods, the right to take, except in the cases provided for, is necessarily prohibited, and the right which would otherwise have existed is restricted to the occasions expressly provided for, *expressio unius est exclusio alterius*, or as it is otherwise worded, *expressum facit cessare tacitum*, is a maxim frequently resorted to in the interpretation of deeds and contracts, as well as statutes, and has particular reference to inferences of fact to be drawn from written documents or parol declarations. It means that if some, out of certain requisites, are expressly named, the inference is stronger that those omitted are intended to be excluded, than if none at all had been mentioned. (*Per ALDERSON, B., Doe agt. Burdett*, 9 *A. & E.*, 936.) It was regarded by Lord DENMAN, C. J., as one of the first principles applicable to the construction of deeds. (*Line agt. Stephenson*, 5 *Bing. N. C.*, 183.) Implied covenants are in all cases controlled within the limits of an express covenant, and have, although the word "demise" in a lease implies a covenant for title, and for quiet enjoyment, yet both branches of such implied covenant are restrained by an express covenant for quiet enjoyment. (*Line agt. Stephenson, supra*; *Noke's case*, 4

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Rep., 80; *Merrill* agt. *Frame*, 4 *Taunt.*, 329; *Deering* agt. *Faringlon*, 1 *Ld. Raym.*, 14.) For other applications of the maxim, see 5 *Rep.*, 97; *Hare* agt. *Horton*, 5 *B. & Ad.* 715. In *Doe* agt. *Burdett* (7 *Scott N. R.*, 66) it was decided by the house of lords, reviewing the judgment in exchequer chamber (9 *A. & E.*, 936), that a general attestation to the execution of a power, without expressly stating the performance of the required formalities, was a good execution of the power, distinguishing the case from several in which the attestation clause, in terms, stated the performance of some of the required formalities, but was silent as to others, and in which consequently the power was held not to have been well executed, on the ground that legal reasoning would necessarily infer the non-performance of the others, but that a general attestation clause imputed an attesting of all the requisites. (*Wright* agt. *Wakefield*, 17 *Vesey*, 454; *Doe* agt. *Peach*, 2 *M. & S.*, 576.) The legal effect of deeds and contracts may be restricted and limited by an express provision, or by implication resulting from an express provision. When the parties themselves make express provisions the reason for legal implication fails. A mortgage by law passes all the fixtures of shops, foundries and the like, on the land mortgaged; but if the instrument enumerates a part, without words, distinctly referring to the residue, or requiring a construction which shall embrace the residue, no fixtures pass but those mentioned. (*Hare* agt. *Horton*, *supra*; 2 *Parsons on Contracts*, 27, 28.) So here the law would, if the parties had been silent, have given the mortgagee the right to take possession at his pleasure; but as the parties have provided expressly for the taking of possession by the mortgagee upon certain contingencies, the right to take possession upon any other event is necessarily excluded, and the mortgagor had the legal right to the possession until by the terms of the mortgage the mortgagee became entitled. This, if I am right, but for right of the mortgagee to take possession upon

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deeming himself insecure, would clearly give the mortgagor the right of possession of the goods for a time certain, and render them liable to the execution for his debts. (*Hull agt. Carnley, supra.*) In *Warner agt. Munroe*, we held that this claim did not vary the legal rights of the parties, and render a party taking the goods by authority of the mortgagee, or upon process against him, liable as a trespasser. For the reason then assigned, I am of the opinion that the defendant is not liable to this action for taking and selling the goods or the property of the mortgagee, before default in the payment of the mortgage debt, and while the mortgagor remained in possession, before the mortgagee made any claim to them.

The judgment must be reversed and a new trial granted, costs to abide event.

NEW YORK SUPERIOR COURT.

BELL agt. BIRDSALL and others.

Under a decree of foreclosure of mortgaged premises, the court will give possession to the purchaser as against all persons who are parties to the suit, or who come into possession under either of them while the suit is pending. But it does not undertake to remove persons who go into possession after the purchaser has received his deed, and conveyed the premises to another.

Special Term, September, 1860.

THIS was an application made before Justice BOSWORTH, at special term of the superior court, for a writ of assistance to aid in ousting the defendants, or tenants under them, from certain premises to which plaintiff claimed the right of possession.

JOHN G. VOSE, *for motion.*

NELSON SMITH, *opposed.*

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Bosworth, Ch. Justice. In this and another action against the same defendants, decree of foreclosure and sale was made as early as the 13th of October, 1858. The premises were sold under the decree on the 6th of June, 1859, and Joseph H. Gray became the purchaser, and received the referee's deed the same day. He now petitions for a writ of assistance to remove Birdsall and one Miller, on the allegation that they are in possession, and refused to give up after demand made and exhibition of the deed. Miller makes affidavit that Joseph H. Gray conveyed the premises to John G. Vose by deed, dated Jan. 21, 1860. That Miller was not a party to either suit, and entered into possession about the 1st of May, 1860, and not before. That he hired the premises of C. A. Birdsall for one year, believing her to be the owner, and has paid all of the agreed rent except \$50, which is payable the first of May next.

I think the court has no power to grant such a writ to remove Miller. The usual form of a decree is, that any of the parties in this cause who may be in possession of said premises, or any part thereof, and any persons who, since the commencement of this suit, have come into possession under them, or either of them, deliver the possession thereof to the purchaser or purchasers, &c. (3 *Hoff. C. Pr.*, 4.) The court gives possession to the purchaser, as against all persons who are parties to the suit, or who came into possession under either of them while the suit is pending. It does not undertake to remove persons who go into possession after the purchaser has received his deed and conveyed the premises to another. Miller also makes affidavit that he has been informed by said Vose, that after said deed to him he had sent a man and took possession of said premises.

The object of the writ and the consideration in which it is granted is, that when the court makes a sale and transfers the title, it will take the possession from a party whose rights have been determined by the suit in which the sale was ordered. A person found in possession when the pur-

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chaser obtains his deed, and who went into possession under some one of the parties while the suit was pending, is treated in this respect as if a party.

Although Miller entered under C. A. Birdsall, yet as he entered over fifteen months after the sale, he cannot be regarded as having entered pending the suit. If he may be removed for the benefit of the present owner, I do not see why any person who enters ten or fifteen years hence, under a person who was a party to the suit, may not be removed by a writ of assistance for the benefit of some future grantee of the premises. (*Frelinghuysen agt. Colden, 4 Craigie, 204; 4 J. Ch. R., 609; 1 Hop., 231.*) The motion must be denied as to Miller, but as he shows no right to be in possession, without costs.



SUPREME COURT.

THE PEOPLE *ex rel.* THE BROOKLYN INDUSTRIAL SCHOOL
AND HOME FOR DESTITUTE CHILDREN agt. THOMAS
KEARNEY.

A *father* has authority, under the statute and the common law, by *deed* or *will* duly executed, to dispose of the *custody* and *tuition* of his *infant children* during their minority, or for any shorter period, to any person or persons; and the person to whom it shall be made shall have all the rights and powers, and be subject to the duties and obligations of the *guardian* of such infants; and such disposition shall be valid and effectual against every other person claiming the custody or tuition of such infants as *guardian in socage* or otherwise.

A *surrogate's* power and authority to appoint a *guardian* for an *infant* exists only where the *father* has failed to appoint by *deed* or *will*.

A *father*, four days before his death, executed and delivered an instrument, as follows: "I, John Laffin, of the city of Brooklyn, father of Catharine or Kate, and Mary Ann Josephine Laffin, do commit and surrender said children to the care and management of the Brooklyn Industrial School Association and Home for Destitute Children, with the powers and subject to the provisions contained in the act incorporating the said association and home. Dated Brooklyn, December 13, 1858." Signed by John Laffin, and witnessed by two witnesses.

Held, that such disposition was as valid and effectual as if it had been made under the first two sections of the general act concerning *guardians* and *wards*, it being

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made in conformity with the act incorporating the relator as a charitable institution; and that a subsequent appointment under the general act of the grandfather of the infants, a guardian for such infants, by the surrogate of Kings county, was of no force as affecting the testamentary disposition before made by the father.

Also, *held*, that the appearance and opposition of the relator, before the surrogate, to the appointment of the grandfather as guardian, whereby the surrogate pronounced the testamentary deed of the relator invalid, was not to be regarded as a decision *res adjudicata* upon *habeas corpus* to discharge the children from the custody of the relator.

Again, *held*, that the children remaining with their father from the date of the execution of the testamentary deed until his death, some four days, did not have the effect to convert the transaction from a *present* to a *prospective* surrender of them.

Poughkeepsie General Term, May, 1860.

Present, LOTT, EMOTT, BROWN and SCRUGHAM, Justices.

JOHN LAFFIN, of Brooklyn, died December 17th, 1858, intestate, leaving two children, Catharine, aged about five, and Mary Ann, about three years of age, and no widow. December 13th, 1858, he executed and delivered an instrument in writing, as follows:

“I, John Laffin, of the city of Brooklyn, father of Catharine or Kate, and Mary Ann Josephine Laffin, do commit and surrender said children to the care and management of the Brooklyn Industrial School Association and Home for Destitute Children, with the powers and subject to the provisions contained in the act incorporating the said association and home.

“Dated, Brooklyn, Dec. 13th, 1858.

his
JOHN X LAFFIN,
mark.

“Witness, Anne Kimberly.

“Witness, Susan C. Smith.”

The following was written on the margin:

“Catharine Laffin, born 26th October, 1853.

“Mary Ann Josephine Laffin, born 19th Oct., 1855.”

The children remained with their father until his death, when they were taken by the Brooklyn Industrial School

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Association, and they remained with them until the decision on the *habeas corpus* in this case.

On the 22d of December, 1858, Thomas Kearney, the maternal grandfather of said children, presented a petition to the surrogate of the county of Kings, asking to be appointed guardian of the persons and estates of said children. Notice of hearing was served on James Laffin, an uncle, and Ann Nolan, an aunt of said minors, on their father's side. At the hearing Jesse C. Smith, Esq., appeared as counsel for the Brooklyn Industrial School Association and Home for Destitute Children, and filed an affidavit proving the execution of said surrender, and claimed that the surrogate had no jurisdiction to appoint a guardian for said minors, by reason of the surrender. The surrogate decided that he had jurisdiction to appoint a suitable person as guardian of the minors under the statute, notwithstanding the act of 1857 incorporating the Brooklyn Industrial School Association.

Mr. Smith also appeared before the surrogate for James Laffin and Ann Nolin, and after the decision of the surrogate that he had jurisdiction, as above stated, an application was filed by James Laffin to be appointed guardian of said minor children.

Testimony was taken before the surrogate as to which of the two applicants, Thomas Kearney, the grandfather, or Jas. Laffin, the uncle, should be appointed guardian, and the surrender above set forth was offered in evidence on the part of James Laffin, for the purpose of showing the wish of John Laffin, the father of said children, as to the care and custody of the children, and the manner in which they should be brought up, and it was ruled out by the surrogate.

The surrogate, after hearing both parties, appointed Thomas Kearney, the grandfather, guardian of the persons and estates of said children, until they should arrive at the age of fourteen years, and until another guardian should be appointed. Thereupon Thomas Kearney, the relator, as

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such guardian, presented a petition to SAMUEL D. MORRIS, Esq., county judge of Kings county, stating that said Catharine and Mary Ann Laffin were detained and restrained from their liberty in the city of Brooklyn, by the Brooklyn Industrial School Association and Home for Destitute Children, the respondents, and asked for a *habeas corpus*, commanding the respondents to bring said children before him.

A *habeas corpus* was thereupon issued and served. On the 31st of March, 1859, the relator and respondents appeared before the county judge, and the respondents made a return under oath, claiming the custody of said children, under the surrender hereinbefore set forth.

The relator traversed the said return, and denied that the children were detained by any valid process or authority; denied that they were surrendered in any legal manner; averred that John Laffin, when he executed said surrender, was of unsound mind; that the respondents used undue influence to obtain said surrender. He also alleged that the respondents had appeared before the surrogate, and opposed the appointment of the relator as guardian, and had offered the surrender as a reason why he should not be appointed, and that the same was considered by said surrogate, and was pronounced insufficient and invalid, and that, therefore, the legality and sufficiency of the surrender was passed upon by said surrogate, and was an adjudication as to its validity.

The respondents offered in evidence the surrender proved before a commissioner of deeds, and rested their testimony.

The relator called several witnesses to show that John Laffin was not of sound mind at the time he executed the surrender.

The respondents then gave testimony showing that John Laffin was of sound mind, and was not operated upon by undue influence, and proved also the facts which took place upon the execution of said surrender.

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The county judge, after hearing the testimony, and summing up by the counsel for the respective parties on the 16th day of May, 1859, made an order discharging the children from the custody of the respondents, and ordering them to be delivered to the relator, Thomas Kearney, on two grounds:

First.—That the decision of the surrogate, upon the surrender, was *res adjudicata*, and that the surrogate having pronounced the surrender invalid, the county judge was bound by such decision; and

Second.—That the surrender was conditional, and not to take effect until the death of John Laffin, and, therefore, invalid.

JESSE C. SMITH, *for the relator.*

JOHN GREENWOOD, *for the respondent.*

By the court, BROWN, Justice. This is a *certiorari*, brought to remove and review certain proceedings upon a *habeas corpus*, had before S. D. MORRIS, Esq., county judge of Kings county, in which he awarded the custody of Catharine Laffin and Mary Ann Josephine Laffin, infant children of John Laffin, deceased, to the defendant, Thomas Kearney. The relator claimed the custody of the children, by virtue of an instrument in writing, executed by John Laffin, the father, on the 13th December, 1858, and just before his death, and the defendant claimed the care and control as their guardian, duly appointed by the surrogate of the county of Kings, on the 2d March, 1859. The infants are of very tender years, the eldest, Catharine, having been born on the 26th October, 1853, and the other, Mary Ann, on the 19th of October, 1855. The death of their father left them both orphans, without property or means of support, in fact both at the time their father executed the instrument of the 13th December, 1858, and also when the defendant procured himself to be appointed their guardian,

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were in a state of utter poverty and destitution, and have so remained to the present time.

At the common law the parents are the guardians of their infant children; first the father, and if he be dead, the mother. This results from the nature of the relation between parent and child, and is a recognition of the ties, duties and obligations which bind them to each other. By the 5th section of the act in regard to the tenure of real property, when an estate in lands becomes vested in an infant, the guardianship of such infant, with the rights, powers and duties of a guardian in soccage, shall belong, first, to the father, and if there be no father, to the mother, and if neither father or mother, to the other relatives of the infant. This class of guardians would have authority to take charge of the whole estate, both real and personal. But where there is no real estate, the father, as the guardian by nature, has no power over the personal estate of his infant child. The rights and authority of this class of guardians are in all cases superceded, where a guardian is appointed by the deed or last will of the father, or in default thereof by the surrogate. (2 *Kent's Com.*, 224.) The first section of the act concerning guardians and wards, gives to the father power by deed or will, duly executed, to dispose of the custody and tuition of his infant children during their minority, or for any shorter period, to any person or persons. And § 2 declares that the person to whom it shall be made, shall have all the rights and powers, and be subject to the duties and obligations of the guardian of such infants, and such disposition shall be valid and effectual against every other person claiming the custody or tuition of such infant, as guardian in soccage or otherwise. I am thus particular to refer to these rules of the common and statute law, for the purpose of keeping in mind that the power of the father as a natural guardian of his infant children while living, and his power to appoint a testamentary guardian for them during their minority

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after his death, has always been maintained, and still remains unimpaired.

The power of the surrogate under the act concerning guardians and wards, is not limited to that favored class of infants who are endowed with estate, real or personal. He may doubtless appoint a guardian for the infant inmate of a poor-house, without property, and without name or lineage. But it would be vain to deny that the statute, and the practice under it, has reference specially and particularly, nay, almost exclusively, to the former class. This is manifest from the various provisions in regard to bonds with securities, for ascertaining the value of the infant's property, and for the keeping, rendering and settling accounts, and for compensation and recompense for expenses and services, and for the removal of the guardian for incompetency, or other dereliction of duty. These numerous and complicated provisions can have no possible application to those minors whose condition is orphanage and destitution. The guardian is not bound to support and maintain his ward from his own means. The law imposes upon him no such duty; he may provide for them from humanity, from the impulses of sympathy and charity; but the moment the ward's property and substance is exhausted, the legal duty and obligation of the guardian is at an end, for he owes none which the law will enforce. If Thomas Kearney should abandon these helpless children, there is nothing for them but what the laws for the support of the poor may afford, or the charities of some such institution as that from which the order of the county judge has separated them.

The relator is an institution incorporated by the act of the 15th of April, 1857. Its objects are purely charitable, maintained by private beneficence, and designed to provide guardians, or quasi guardians, for those children of poverty and indigence, who are left by obvious causes outside of the operation of the general law in relation to guardian and

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ward. In the language of the act of incorporation, the associates are constituted a body corporate, "by the name of the Brooklyn Industrial School Association and Home for Destitute Children, whose object and business shall be to establish and support industrial schools, and to establish and maintain a home for destitute children in the city of Brooklyn." The 6th section of the act authorizes the surrender of infant children by their natural or other legal guardian, to the care and management of the association by any instrument or declaration in writing, and then proceeds to prescribe the duties of the association in respect to such children. Section 7 declares, that upon the death, absence or incapacity of the father, the mother may make the surrender, and if she be dead or otherwise incapable, then the mayor of the city of Brooklyn, or the surrogate of the county of Kings may perform the same office. The act contains other and ample provisions for the binding out and apprenticing these children, and for their care, education and protection by the association, which it is not necessary to quote at large. The provision in the 6th section is a recognition of the ancient right of the father to provide a guardian for his infant child by deed or will, and the instrument in writing there referred to, by which the surrender is to be made to the association, is a substitute for the deed or last will mentioned in the 1st section of the act concerning guardians and wards, in cases where the poverty and indigence of the parents and children would leave the general act practically inoperative and unavailing. The instrument in writing by which the relator claimed the custody of the children, was duly executed by their father, John Laffin, in the presence of two witnesses, on the 13th December, 1858, and four days thereafter he died. The children remained with him until his death, and were then taken away by the relator. Thomas Kearney, who is their grandfather, caused himself to be appointed their guardian by the surrogate, on the 2d March, 1859; and on

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the 29th March he sued out the writ of *habeas corpus*, and instituted the proceeding under which they were, by the order of the county judge, taken from the custody of the relator and delivered over to the defendant, on the 16th of May thereafter. The issue between the parties in the proceedings, upon the return to the writ of *habeas corpus*, was the right to the custody of the children, and this depended upon the question, whether the appointment of the general guardian by the surrogate, superceded and rendered inoperative and void the appointment and surrender made by John Laffin, the father, to the relators, by the written instrument of the 13th December, 1858. The two first sections of the act concerning guardians and wards, and under which act the defendant, Kearney, derives his authority, were made in affirmation and assurance of the father's right to dispose of the custody and tuition of his infant children during their minority, by deed or by his last will and testament. "A will merely appointing a testamentary guardian need not be proved, and though the statute speaks of appointments by deed as well as by will, yet such a disposition by deed may be revoked by will; and it is evident from the language of the English statute, and from the reason of the thing that the deed there mentioned is only a testamentary instrument in the form of a deed, and to operate only in the event of the father's death." (2 *Kent's Cim.*, 225.) The disposition which John Laffin made of his children was as valid and effectual as if it had been made under the two first sections of the general act, for it was made in exact conformity with a requisition of the 6th section of the act, incorporating the relator; and the children were of the class which the act of incorporation was designed to protect and benefit. To give to the appointment of guardian by the surrogate, under the general act, the force claimed for it by the defendant would be to impair the right of the father to dispose of the tuition and custody of his infant children, and virtually to set

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aside the wise and humane provisions of the act incorporating the relator. Besides, the surrogate's power and authority to appoint a guardian for an infant, exists only where the father has failed to appoint by deed or will (§ 4); and although it may not be necessary to determine upon this appeal the question of the surrogate's jurisdiction, it is evident, I think, that the guardian he did appoint must hold whatever authority he has, subject to the superior right of the relator to the care and custody of the children under the appointment and surrender made by the father in his lifetime. It occasionally happens that letters of administration are granted upon the estate of a deceased person, when there is a will in existence unknown and unproved at the time which disposes of the entire estate. Upon proof of the will, the administrator and all his rights and duties under the letters, are superceded by the will, and must yield to the superior right of the deceased in his lifetime, to dispose of his effects through executors of his own appointment, at his own pleasure. So, also, it may occur that statutory guardians for infants may be appointed when there is a deed or will in existence, appointing testamentary guardians for these same children, which may be undiscovered and unknown at the time. In this case, also, it cannot be doubted that the statutory guardians would be superceded, and their powers suspended by the production of the deed or will appointing others to execute the same trusts.

It was said upon the argument, that the decision of the surrogate in awarding the letters of guardianship to the defendant, concludes the relator in the proceedings upon the *habeas corpus*. That the question is *res adjudicata*. There are two very sufficient answers, I think, to this proposition. To entitle the surrogate's adjudication to this weight, it must have been directly upon the point in controversy, and between the same parties, and the surrogate must have had cognizance and jurisdiction of the same question litigated

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in the proceedings upon the writ of *habeas corpus*. The first answer is, that the relator was not, and could not have been made a party to the proceeding before the surrogate. The surrogate's court is a court of special and limited jurisdiction, and must proceed to exercise its powers according to the letter of the statute from which it derives them. Its authority in regard to parties, upon a petition for the appointment of a guardian, is to be found in the 5th section of the act. The parties, other than the petitioner, are limited to the relatives of the minor residing in the county. The person to whom the minor may have been apprenticed by indenture, or to whose care and custody he may have been committed by the deed or will of the father, cannot be made, nor can he make himself a party to such an application, so as to be concluded by the judgment or decree, for the very obvious reason that the act has given the surrogate no such authority. It prescribes what he shall do, and who he may call before him to be bound and concluded by his decrees. The voluntary appearance of the counsel for the relator before the surrogate, upon the hearing of Thomas Kearney's application, did not conclude or affect its right to the custody of the children. The next answer to the point of *res adjudicata* is, that the right to the custody of the infants was not the question before or determined by the surrogate. His power was limited to an examination and determination into the fitness of the proposed guardian, the value of the infant's personal estate, and the rents and profits of his real estate, and to fix the amount and the sufficiency of the security to be given. The force and effect of the letters of guardianship, and the power of the guardian under them, was not a subject for the surrogate's consideration. They might, or they might not, invest the person appointed with a right to the control and custody of the infants, as the extraneous circumstances might happen to be. But that was not for the surrogate to settle. He issued the letters, and when the appointee came

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to assert rights under them, as against third persons, standing in the situation of the relator, then those rights being purely incidental to the appointment, would become proper subjects for consideration and adjudication.

It was said upon the argument that the surrender mentioned in the 6th and 7th sections of the act, incorporating the relator, is intended to be a present act, and to place the association immediately in *loco parentis*. That the term *ex vi termini* implies a present act. Strictly speaking this may be so; but it would be a most narrow and illiberal construction to apply the rule literally to this act, which is purely charitable, and which in no possible contingency can interfere with the rights of property. Especially would this be so when the opposite construction does no more than give effect in another form to the father's right to appoint a testamentary guardian for his infant children. But concede its application for the present, and what is there upon the face of the instrument of the 13th December, 1858, or in the evidence, to show that the surrender by John Laffin to the relator, was not a present act. The instrument imports an absolute and immediate surrender. He was, at the time it was executed, in the last stage of an incurable disease, and was awaiting his dissolution hourly. He asked that his children might remain with him during the brief period that yet remained to him of life. To this last request of a dying father those representing the association assented. How could they do otherwise, and with what reason can it be said, that suffering these little children to remain with their father for a few days or hours until he expired, and the last act of life was concluded and consummated, converted the transaction from a present to a prospective surrender.

Something is said in the opinion which accompanies the order appealed from, touching the incapacity of John Laffin at the time he executed the instrument of surrender; but as there is no proof whatever to show such want of mental

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capacity, the counsel wisely omitted to refer to it upon the argument.

It is the duty of the courts to carry out the manifest intention of the legislature, and give effect to the humane and charitable provisions of the act, which incorporates and creates the relator, but it must be evident to the most ordinary apprehension, that if the relatives of destitute orphan children committed to its care and supervision by the written instrument of the parent, can reclaim and recover their custody under authority derived from the general statute concerning guardians and wards, the act of incorporation may in many cases be rendered nugatory and ineffectual to accomplish any useful or valuable purpose.

The proceedings and order of the county judge should be reversed, with costs, and restitution of the two infant children referred to in the proceedings is ordered.

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NEW YORK SUPERIOR COURT.

THE NEW YORK CAR OIL COMPANY, respondents, agt. ALLEN H. RICHMOND and ABRAHAM SPRINGSTEEN, appellants.

The act of 1848 authorizing the formation of corporations for manufacturing, mining, mechanical or chemical purposes, requires that a *certificate* of such incorporation be filed in the office of the clerk of the county, and a duplicate thereof in the office of the secretary of state, and that "the copy of any certificate of incorporation, filed in pursuance of the act, certified by the county clerk or his deputy to be a true copy, and of the whole of such certificate, shall be received in all courts and places as *presumptive legal evidence* of the facts therein stated."

Held, that this provision does not necessarily exclude every other mode of proving the fact of incorporation; hence, where it was proved that the certificate was duly executed, and was filed with the county clerk, and the fees paid, but was thereafter lost, the party could not be prejudiced thereby, if he could prove the fact by other competent testimony.

Therefore, proof given by witnesses on the trial of the filing and the contents, by the production of a copy sworn to be a true copy of such certificate, and that the original could not be found, was proper evidence. And where a copy of the duplicate certificate, filed in the office of the secretary of state, was not only certified, but

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was produced and sworn to be a true copy, the evidence was competent and sufficient.

Where the appellant alleges and relies upon defects in the certificate of incorporation of the respondents, as not a compliance with the statute, but does not see fit to set forth a copy in his case or exceptions, the court will consider the finding of the court below, or the referee, upon that question, as conclusive on the appeal.

Where property is levied upon and taken by a sheriff or constable under an execution, and it appears that when the levy was made the property was in the actual possession of the defendant in the execution, the sheriff or constable may be entitled to a *demand of the property before action brought* for such taking. But it is only when the property is *lawfully* in possession of the defendant that a previous demand before suit brought is necessary.

The mere fact of a person in the employ of the defendants in an execution, but not their general agent, pointing out property as the property of the defendants, and consenting to a levy, does not conclude or estop the owner from showing title and possession in himself.

New York General Term, March, 1860.

Present, HOFFMAN, WOODRUFF and MONCRIEF, Justices.

APPEAL from judgment in favor of the plaintiffs, on trial before a referee, pursuant to his report.

The action is brought to recover the possession of eight and one-half casks of oil, and ten bushels of coal, and one tank of oil, the property of the plaintiffs, of which it was alleged the defendants had become wrongfully possessed, and which they wrongfully detained from the plaintiffs, who, as the complaint alleged, are a manufacturing corporation, organized under the act of February 17th, 1848, entitled "an act to authorize the formation of corporations for manufacturing, mining, mechanical or chemical purposes."

The answer of the appellant, Richmond, who alone defended, denied that the plaintiffs are a corporation; denied that the plaintiffs owned or had any interest in the property; denied the taking or detention of the plaintiffs' goods mentioned in the complaint; and for further answer averred the recovery of a judgment by said appellant against the "American Oil Manufacturing Company," the issuing of an execution thereon, its delivery to the defendant, Springsteen, a constable, the levy thereof upon pro-

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perty on the premises occupied by the American Oil Manufacturing Company, which property belonged to the last named company, and was at the time in the custody of its agent, which property is partly described in the complaint.

On the trial before Daniel B. Taylor, Esq., to whom by consent the case was referred, the plaintiffs offered in evidence a copy of a certificate of association in the office of the secretary of state. The defendants objected to the evidence, on the ground that it was not in compliance with the statute; that the certificate of the county clerk of the fact that such certificate had been filed with him should be produced.

The plaintiffs then proved by the deputy clerk, from the county clerk's office, whose duty it was to enter such certificates in an index, that he had searched in that office, and could not find any article of association of the New York Car Oil Company on file, or in the office of the county clerk; and by two other deputies that the witnesses so examined had charge of the entering and filing of such certificates, and that one of the last named witnesses, according to the routine of business, received such papers and the fee for filing, thirteen cents, and delivered them to the first named witness the following morning, to be entered and filed in the proper place of deposit.

He then proved, by two witnesses, that the articles of association were executed in duplicate, one copy to be filed in the county clerk's office, and one to be sent to the secretary of state, and one of those witnesses stated that there were three original copies, all executed; that he filed one about the last of September, 1857, in the office of the county clerk; that he handed to the person at the desk, and paid him his charge, twelve or thirteen cents, and sent another copy to the secretary of state.

The same two witnesses, and also a third, testified that in January, 1858, they saw those articles of association in the office of the county clerk, and examined them there,

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with a view to preparing the further certificate or report required by the statute, which must mean the report mentioned in the 12th section of the act, stating the amount of capital paid in, and other particulars there mentioned.

The copy produced was shown to be a true copy of the articles so filed, and it was received in connection with the oral testimony, as proof of the incorporation of the plaintiffs.

The taking of the goods, or so much thereof as was recovered, was then proved, viz., eight barrels of oil, and three barrels of coal, and their value; but it was also proved that the person who had the care of the manufactory where the property was found at the time of the taking, told the constable and the defendant, Richmond, by whose direction the constable was acting, that the property belonged to the defendants in the execution which he held, viz., to the American Oil Manufacturing Company.

There was great conflict of evidence on this question, whether the property belonged to the American Oil Manufacturing Company or to the plaintiffs, and whether in fact there was any such company as the "New York Car Oil Company." The defendants insisting that the whole claim of the plaintiffs was an artifice, resorted to to cover up and protect the property of the American Oil Company, by the pretence of having formed a new incorporation, and the further pretence that the oil in question was manufactured and owned by a new incorporation, when in truth the machinery, the lease of the factory, and all of the property belonged to the former company, which confessedly had held the lease, owned the machinery, and carried on the business, and that this was done to avoid the payment of the debts of the American Oil Manufacturing Company.

Testimony was also given by the defendants, tending not only to contradict, but to impeach the character of some of the plaintiffs witnesses.

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The referee found, as matters of fact and law, that the plaintiffs were duly incorporated; that the property in question belonged to them; that its value was \$310; and that they had sustained damage by the taking to the amount of \$20, and awarded the property to the plaintiffs, with their said damages and costs of suit. The defendant appealed to the general term, and the exceptions taken on the trial raised the points considered in the opinion of the court.

Mitchell Sanford, for appellant.

E. W. Dodge, for respondents.

By the court, WCFRUFF, Justice. I. The first exception upon which the appellant insists as a ground of reversal is, that the referee erred in admitting the certificate purporting to be a certified copy of the incorporation of the plaintiffs, filed in the office of the secretary of state.

This exception may be properly considered in connection with another, viz., that the referee should have granted a non-suit, as moved for by the defendants, on the ground that the plaintiffs did not sufficiently prove that they were duly incorporated under the act under which they claimed such incorporation, viz., the act of February 17, 1848. (*Laws of 1848, ch. 40.*)

In so far as these exceptions proceed upon the form of the certificate given in evidence, or the manner of its authentication, or any supposed defect therein, for want of compliance with the act, it must suffice to say that the appellant has not thought proper to embody the certificate of association, or the copy produced on the trial, in the case or bill of exceptions, settled and furnished to the court on appeal. We are therefore unable to discover whether there are or are not any such defects therein, and must assume that no such defects exist, and that the appellant does not rely upon any such defects as grounds of objection, nor

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were any defects in the form of authentication thereof suggested on the argument of this appeal; and we have only to inquire whether, under the circumstances proved at this trial, the production of a certified copy from the office of the county clerk could be dispensed with, and whether without such production the incorporation of the plaintiffs could be proved at all, and was sufficiently proved.

The act of 1848 requires that a certificate be filed in the office of the clerk of the county, and a duplicate thereof in the office of the secretary of state; and in the 9th section the act provides that "the copy of any certificate of incorporation filed in pursuance of the act, certified by the county clerk, or his deputy, to be a true copy, and of the whole of such certificate, shall be received in all courts and places as presumptive legal evidence of the facts therein stated."

In the first place, we do not regard this provision as necessarily excluding every other mode of proving the fact of incorporation; it provides one mode of proving the fact, a simple and in general an easy mode of doing so.

But if such certificate ought to be regarded as the best evidence, and therefore to be produced in the first instance, the rule requiring a party to produce the best evidence only holds when such production is possible, and on its being shown that for some reason not within the control of the party the best evidence cannot be produced, secondary evidence may be given.

Hence the plaintiffs proved by evidence satisfactory to the referee, that the certificate was duly executed, and was filed with the county clerk, and the fees paid. The party was no longer responsible for the safe keeping of the certificate, and if it was lost by the county clerk after it had been left with him, the party could not be prejudiced thereby if he could prove the fact by other competent testimony. This the plaintiffs did by the best evidence that can be suggested. They proved the fact of filing, and

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they proved the contents of the paper filed, by the production of a copy sworn to be a true copy of the certificate. From the necessity of the case, resulting from the loss of the paper filed, it was impossible that the county clerk could certify the paper produced to be a copy, and the plaintiffs were not responsible for the inability of the clerk to certify, and should not be prejudiced by it. Any other doctrine would render the proof of the existence of any corporation so organized dependent upon the care of the county clerk in preserving papers filed; and in case of the accidental destruction of papers in that office, render such proof wholly impossible; no such doctrine can be admitted for a moment.

In the next place, if the contents of the certificate could not be established by parol evidence, or by a sworn copy, the duplicate produced from the office of the secretary of state was the next highest evidence. It was proved that the certificate was executed in duplicate, and one was filed in the office of the secretary of state. A copy of this was produced, and was not only so certified, but was also sworn to be a true copy. We have no hesitation in saying, that even if there were no other provision by statute bearing on this subject, this proof of the plaintiffs incorporation was, after proof of the loss of the paper filed by the county clerk, competent and sufficient.

Again, the certificate was filed in the office of the secretary of state, in compliance with the express provisions of the law, and by the general laws of the state (1 R. S., 166, § 4). it is enacted that "all copies of records and papers in the office of the secretary of state, certified by him, and authenticated by the seal of his office, shall in all cases be evidence equally and in like manner as the original."

These views are sufficient; and we think they conclusively dispose of all objections founded on the idea that the plaintiffs were bound to prove their incorporation by producing either the original or a certified copy thereof from the

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county clerk's office ; and, as already suggested, the appellant not having seen fit to insert the paper or papers in his case or exceptions, we have no means of examining the contents, or form, or authentication thereof, to determine whether they are or are not a compliance with the statutes. The finding of the referee, therefore, must stand unimpeached by anything appearing before us on this appeal.

II. The next objection urged upon our attention is, that the plaintiffs should have proved a demand of the property before action brought.

Where property is levied upon and taken by a sheriff or constable under an execution, and it appears that when the levy was made the property was in the actual possession of the defendant in the execution, the sheriff or constable may be entitled to a demand of the property before action brought for such taking. It does not follow that the plaintiff in execution actually directing such levy and taking, is entitled to any such demand, if in truth the party so in possession has no leviable interest in the property taken.

In this case, Springsteen, the constable made no defence; he suffered judgment by default; as to him, therefore, the question does not arise.

But the very question : in whose possession was the property found ? was one of the questions most severely contested on the trial. The same proof that bore upon this question, bore also on the inquiry whether the property belonged to the plaintiffs or to the defendants in the execution ; and it is, we think, entirely clear that if the proof did not establish that the property belonged to the defendants in the execution, then it did not prove that the property, when levied upon, was in the possession of those defendants.

The referee has found that it was the plaintiffs' property, and unless that finding was against the evidence, we must regard the same proofs as establishing this point also ; and if the defendant desired a specific finding upon the ques-

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tion, from whose possession was the property taken? He should have called the attention of the referee to that subject, and procured such finding thereon. In the absence of such finding, we must take the fact to be favorable to the plaintiffs who have prevailed, since the evidence would, we think, clearly warrant such a finding. (*Fish agt. Wood, 4 Ed. Smith's R., 372; Hardin agt. Palmer, 2 id., 172; Viele agt. The Troy and Boston Railroad Company, in court of appeals, December, 1859.*)

It is only when the property is lawfully in the possession of the defendant that a previous demand before suit brought is necessary.

III. It is claimed that inasmuch as the person in charge of the manufactory pointed out the property as the property of the defendants in the execution, the plaintiffs are therefore concluded.

The mere circumstance that Hazzard, the person referred to, was in the employment of the defendant, wrought no such consequence. He was not the general agent of the defendant. It is testified that one Griffin was the plaintiffs' agent; that Hazzard stayed there and watched the building; was employed to take in and put out goods, and to watch the premises, and sometimes sold small quantities of oil. He could not estop the plaintiffs by consenting to a levy in satisfaction of the debt of a third person, any more than he could lawfully deliver the plaintiffs' property to the defendant (the judgment creditor) in payment of his judgment. Besides, Hazzard testified that he requested the defendants not to take the property, and that while he remained there they did not remove it; but he locked the door and left, in order to find and consult the plaintiffs' agents, and in his absence the defendants by some means opened the door, and were removing the oil when he returned.

IV. It only remains to consider whether the finding of the referee, that the property was the property of the

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plaintiffs, was so against the weight of the evidence, that the judgment should be reversed upon that ground.

It must be conceded that there were many circumstances of suspicion in respect to the title of the plaintiffs to the manufactory and the machinery therein; and there was proof that the machinery had been claimed and taken by the American Oil Manufacturing Company (the judgment debtors), by process in a replevin suit that was still pending. The proofs relating to the incorporation of the plaintiffs; the ignorance of Hazzard, one of the employees in the factory, that there was any other company than the American Oil Manufacturing Company, and many other circumstances were justly calculated to create the suspicion that the last named company, having become embarrassed, the scheme of forming, or pretending to form a new company, was devised by its managers, in order to avoid the payment of the debts of the old company, and yet obtain the possession and enjoyment of its property under a new name.

But, on the other hand, there was positive proof that the new company was incorporated. There was some evidence that the new company purchased the machinery and lease of the factory, and the proof was uncontradicted that the oil in question was manufactured by the new company.

In a great conflict of evidence tending to establish either claim, we cannot say that the referee so erred in his conclusion, that his finding should be set aside. We could not do this even if we thought we should have formed the opposite conclusion.

An attempt was made to impeach the plaintiffs witnesses; on the other hand their characters were supported by other testimony. The case depended in no slight degree upon the credibility of the witnesses whom the plaintiffs produced; and if their testimony was believed, the case was clearly with the plaintiffs; the oil was their property.

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Under such circumstances the finding of the referee must be taken by us as conclusive.

The judgment should therefore be affirmed, with costs.

SUPREME COURT.

VALTON and ADAMS agt. THE NATIONAL LOAN FUND LIFE ASSURANCE SOCIETY.

An *appeal* by defendant from an *order denying a motion for a new trial*, without an order to stay plaintiffs' proceedings, or by giving such security as makes the appeal a stay, does not preclude the plaintiff from entering a regular *judgment*. But the entry of judgment does not affect the appeal from the *order*.

The general term decision of affirmance on such an appeal is itself appealable to the court of appeals, just as well as if no judgment had been entered; and a *reversal* by the latter court of the decision of the general term would be a decision *granting a new trial*, and an order would then be required to stay proceedings on the judgment in chief.

A *motion* by plaintiff to *stay proceedings* on the appeal from the *order* until the appeal from the judgment can be heard, cannot be entertained by this court after the appeal from the *order* has been taken to and is pending in the court of appeals. A *notice of judgment* is defective where it omits to state the *clerk's office* in which the judgment is entered; and until a regular notice of judgment is served, the time of the opposite party to bring his appeal is not limited.

The case of *Stewart agt. Saratoga and Whitehall Railroad Company* (12 How. Pr. R., 435), commented on and declared to contain and decide only this point, to wit: that an appeal from an *order overruling a demurrer*, renews the demurrer, and continues an issue of law in the case; and though not a stay of proceedings, it puts the case where *no other proceeding than that on the appeal can be had*.

Albany Special Term, January, 1859.

THIS was a motion to stay proceedings on the appeal from the *order*, until the appeal from the *judgment* could be heard in the general term. Trial was at Albany circuit, January, 1853. Motion for new trial, &c., made and denied at Rensselaer special term, October, 1853. An appeal taken from that *order*; that *appeal* heard at general term, and the *order affirmed*. An appeal from that decision of the general term taken to court of appeals. December 8, 1853,

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plaintiffs *entered judgment* on the verdict, there having been no *order* staying proceedings. The other facts will appear by the opinion.

JOHN K. PORTER, *for motion.*

HENRY NICOLL, *opposed.*

GOULD, Justice. It seems to me in this case that I cannot entertain this motion, as the cause is regularly in the court of appeals;* but as several points are covered by the affidavits and arguments of the parties, I will give my views of the position of this case as to those points of practice, in case I should be wrong in my first remark:

I. The motion for a new trial, made at Troy in October, 1853, was made on the case, as now printed, and on affidavits as to surprise, &c. On that motion the plaintiffs had an *order* refusing a new trial, and *from that* order the defendants took a regular appeal, which appeal took up to the general term all that then existed to go there: the case, with its exceptions, and the *order* thereon; and had no judgment been since entered, that appeal would cover the *whole* case. But as there was no stay of plaintiffs' proceedings (either by the order itself, or any subsequent order, or by giving such security as made the appeal a stay), the plaintiffs were regular in entering their judgment of December 8, 1853.

II. Still the entry of this judgment did not affect the prior good appeal *from the order*. Nor would collecting the judgment have affected that appeal; and that appeal was properly heard at general term, notwithstanding the judgment.

III. The general term decision on this appeal was itself appealable to the court of appeals, just as well as if no

* It seems that the court of appeals so thought, as the appeal was heard and decided. (20 N. Y. R., 32.)

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judgment had been entered on the 8th December, 1853; and it has been duly appealed without, to be sure, any stay of proceedings *on the judgment*; but a reversal on that appeal of the general term judgment of affirmance (which was an affirmance of the *order* denying a new trial, *not* of the *judgment* of December 8, 1853) would have granted a new trial, and an order would then have been made staying proceedings on the judgment in chief.

IV. The appeal to the court of appeals has taken up the order of the general term, and the case with exceptions, all the papers which were used before the general term, and there is, it seems to me, nothing in the way of a hearing in that court.

V. The *notice* of the judgment of December 8, 1853, is defective, in not stating the clerk's office in which the judgment was entered, and the reason why that office is required to be stated to make a sufficient notice, is made perfectly plain in this cause. The notice of appeal must be served on the clerk in whose office the judgment is *entered*, without reference to the county where the motion for judgment or for the decision upon which judgment follows is *heard*; and the order denying the motion for a new trial should have been *entered* by the clerk of Albany county on the certificate of the clerk of Rensselaer county, where the motion *was heard*. While in fact (*case, fol. 42*) the order *was* entered by the clerk of Rensselaer county, and (*case, fol. 47, 48*) the notice of appeal therefrom was served on the clerk of Rensselaer county.

VI. The defendants having received no notice of the judgment of December 8, 1853, may yet appeal from that, and on motion may have the case with exceptions attached to that record, and so hear the whole case at general term.

Before closing I wish to comment on a case which is cited to me by the defendants, and which has been frequently quoted here and elsewhere, as deciding what it did not. I refer to *Stewart agt. Saratoga and Whitehall Railroad Com-*

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pany, before myself (12 *How.*, 435). It is cited to show that an appeal from *any order* is *per se* a *stay of proceedings*. But though my brethren in some districts have sustained that doctrine, as based on that case, and some of them in other districts have written learned opinions overruling that case, as if it contained *that* doctrine, I must beg leave to say that *no such doctrine was ever in that decision*. The decision is, that an appeal from an *order overruling a demurrer, renews the demurrer, and continues an issue of law in the case*; and though *not* a stay of proceedings, it puts the case where *no other proceeding* than that on the appeal can be had, *because by law an issue of law* (when there is one in a case) must be tried *before* any issue of fact can be touched; and the party, though not stayed from *proceeding*, must yet *proceed according to law*, and with his issue of law; and I have not yet seen anything to require me to change *that* opinion.

SUPREME COURT.

In the matter of the petition of JAMES W. BEEKMAN, to vacate assessments, &c.

An ordinance of the common council of the city of New York authorizing an assessment, passed by the board of assistant aldermen in one year, and by the board of aldermen in another succeeding year, a new board of assistant aldermen having been elected during the time, although approved by the mayor, is absolutely *void*, and no *amendment* can give it vitality. (*See to the same effect, Welmore agt. Story, 22 Barb., 414; and Matter of Beams, 17 How. Pr. R., 459.*)

An application to set aside and vacate such an ordinance, and all proceedings under it for irregularity, is authorised by the "act in relation to frauds in assessments for local improvements in the city of New York," passed April 17, 1858. This last mentioned act is not in violation of the constitution of this state, which provides that justices of the supreme court shall not hold any other office or public trust; it does not undertake to confer any new *jurisdiction*, but assumes the old and conceded jurisdiction of this court over frauds and legal irregularities.

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New York Special Term, October, 1860.

APPLICATION by James W. Beekman to vacate assessments, &c., under an ordinance passed by the board of assistant aldermen, in the city of New York, on the 8th of May, 1851, and by the board of aldermen on the 6th of February, 1852.

HENRY Z. HAYNER, for the petitioner.

H. H. ANDERSON, for the corporation.

SUTHERLAND, Justice. The assessment and proceedings complained of by the petitioner must be vacated, because the ordinance purporting to authorize such assessment and proceedings was passed by the board of assistants on the 8th of May, 1851, and by the board of aldermen on the 6th of February, 1852, that is, because it was not passed by both boards in the same year, but was passed by them in different years, so that when passed by the board of aldermen on the 6th of February, 1852, the board of assistants by whom it had been passed had been retired from office, and had been succeeded by a new board of assistants.

It was expressly decided by the general term of this court, in *Wetmore agt. Story* (22 *Burb.*, 414), that an ordinance so passed was absolutely void, although in form duly approved by the mayor, on the ground, as I understand the reported reasons for the decision, that the legislature in designating by the charter the power vested in the two boards as the common council of the city, as the *legislative* power, must be presumed to have intended that the universally recognized principles of *actual* legislatures or legislative bodies, should apply to and control the so called legislative action of the common council of the city of New York, so that a resolution or ordinance passed by the board of assistants in one year, could not be taken up as unfinished business, and concurred in by the board of aldermen in

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another year, so as to make it a valid resolution or ordinance of the common council, without consulting the existing board of assistants; but that like the unfinished business of *other legislative bodies*, it must be taken up *de novo*.

Whatever might be my own opinion of this question as an original question, it would not be proper or in order for me to set up my own opinion against this express decision of the general term, and I must therefore hold in this case that the ordinance purporting to authorize the assessment and proceedings of which the petitioner complains, although approved by the mayor on the 7th of February, 1852, was absolutely void, and did not in fact authorize such assessment and proceedings.

If absolutely void, the subsequent amendment of it in 1853, by striking out the names of the three assessors originally inserted, and inserting three others in their place, did not and could not confirm it, so as to make it a valid ordinance. There is nothing to show that when that amendment was made the common council had the remotest idea that the ordinance required any confirmation. The amendment was in terms confined to the insertion of the three new names in the place of those originally inserted.

This application is made under the act entitled "an act in relation to frauds in assessments for local improvements in the city of New York," passed April 17th, 1858.

It cannot be doubted if the words "*legal irregularity*," as used in the 1st section of the act, mean anything; that the irregularity in the passage of the ordinance authorizing the assessment and proceedings in question was and is a "*legal irregularity*" within the meaning of the act. The ordinance was, or purported to be, the very foundation or authority for the assessment and proceedings complained of. The irregularity of its passage must, under the decision in *Wetmore agt. Story*, be held to be fatal to the assessment and all proceedings under it.

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But it is insisted on the part of the corporation, that the said act of the legislature under which the application is made, was passed in violation of art. 6, § 8 of the constitution of this state, which provides that justices of the supreme court shall not hold any other office or public trust; that the act undertakes to confer on the justices of this court a new or other office or public trust, which by the constitution the legislature were prohibited from doing, and the justices of this court are prohibited from accepting or exercising; and therefore, that I, as one of such justices, cannot entertain this proceeding, or make any order or adjudication in it.

It is very clear to me that this act does not undertake to confer any new, or other office, or public trust on the justices of this court, within the meaning of the constitutional provision.

This court always had jurisdiction over the frauds and legal irregularities (so called by the statute), not only of individuals but of corporations, municipal and private, within its jurisdiction; and could always furnish a remedy to a party who had suffered, or was about to suffer, by such fraud or irregularity, in an action brought by him for such remedy, and perhaps in certain cases, and under certain circumstances, could by *mandamus* or *certiorari* give a remedy for fraud or irregularity in the proceedings of a municipal corporation.

I think the act of April 17th, 1858, in question, assumes this old and conceded jurisdiction of this court over frauds and legal irregularities (so called). It does not undertake to confer any new jurisdiction, or a jurisdiction over a new or additional class of subjects on the court, or the justices thereof, but simply declares that an old and conceded jurisdiction of the court may be exercised and enforced through its justices in a new and summary manner, as to a certain class of frauds and "legal irregularities" mentioned in the act. As the court can only act and exercise its jurisdiction

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through its justices, the act in form declares that the justices of the court shall exercise the jurisdiction in the summary manner prescribed by the act. The act gives to the justices new and additional powers, and imposes upon them new and additional duties, but only as to the mode or manner of exercising an old and conceded jurisdiction, and which, as I have before said, I think the act itself assumes to belong to the court. The act, in fact, gives a new remedy for an old and conceded class of wrongs, and that is all it does or undertakes to do.

If the act had extended the jurisdiction of the court, or in form the jurisdiction of its justices, to a class of municipal frauds and irregularities, for which at the time there was no legal or judicial remedy, I do not think it would at all have interfered with the constitutional provision referred to.

The legislature is constantly conferring on this court, or in form on its justices, new powers, and imposing on them new duties. Of this its justices may perhaps have some reason to complain, but I do not see how the constitution can if the duties are judicial duties.

The powers and duties of a public officer may be said in a certain sense to constitute the office; but adding one or several additional judicial duties to the office of a justice of the supreme court, whose powers and duties are already so multifarious and extensive, can no more confer on him any other office or public trust than "one swallow can make a summer."

On this point my conclusion is, that it is competent for me as a justice of this court to entertain this proceeding, instituted by the petitioner under the act of 1858, and that I have jurisdiction under the act to grant the relief asked for by him.

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SUPREME COURT.

THE PEOPLE OF THE STATE OF NEW YORK agt. THE ALBANY
AND VERMONT RAILROAD COMPANY.

The people, by their *attorney-general*, have the right to bring an action to compel a railroad company to repair a portion of their road, and to operate the same. (*People agt. Mayor, &c., of New York, ante*, p. 155, is *decisive of this principle.*)

After a railroad is completed for use, and is used, the company have no right at their pleasure, and without imperious necessity, to abandon or discontinue any portion of it. Railroads are constructed for public use, and the public have rights in them which should be protected.

Where the public interests demand the running of a portion of a railroad which has been declared discontinued by the company, for their supposed advantage merely, no necessity being shown for such a course, the court will grant an injunction restraining them from removing the rails, &c., pending an action to compel them to repair and operate such portion of their road.

Albany Special Term, September 1860.

THIS is a motion to continue until the hearing of the preliminary injunction heretofore issued, restraining the defendant from removing the iron rails upon some twenty miles of the eastern portion of this road. In 1851, a corporation, known as the Albany Northern Railroad Company, was organized under the general railroad act, to construct a railroad from the city of Albany to Eagle Bridge, in Rensselaer county. The road was completed and put in operation somewhere about 1853, and was run until September, 1859. This railroad was sold under a mortgage foreclosure on the 19th of September, 1859. The purchaser, with certain associates, on the 6th of October, 1859, organized the road anew, over the same track, by its present name of the Albany and Vermont Railroad Company, but with the exception of some twenty days, the defendant has not run or in any manner operated the said eastern portion of its road since that time, and the defendant has removed a portion of the iron rail therefrom. On

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the 12th of June, 1860, the defendant leased to the Rensselaer and Saratoga Railroad Company during defendant's corporate existence, that portion of its road lying between the city of Albany and a point one thousand feet north of its intersection with the Rensselaer and Saratoga road, at an annual rent of twenty thousand dollars, with a clause in the lease making it void at the option of the lessee, in case any part of the defendant's road east of the Hudson river should be operated to carry freight or passengers. This provision applies to that portion of the road now in controversy.

It appears that the defendant's road originally cost over two millions of dollars, more than half of which was contributed by the citizens of Albany, and that the city, in its corporate capacity, advanced \$300,000 towards the completion of the road, but that it cost its present owners only about \$160,000; that a responsible offer to hire said road and its property for ten years, at an annual rent of \$21,000, and to keep the same in good running order, was made to defendant before it made the lease above alluded to. This offer was declined.

It also appears that parties owning stock in the Rensselaer and Saratoga company, uniting with stockholders in the Troy and Boston company, or that the friends of those roads, in April, 1860, purchased a majority of defendant's stock, and thereafter controlled the defendant's road, and under their direction the lease was made to the Rensselaer and Saratoga road, and the track on the eastern portion of defendant's road is directed to be taken up.

In this way all connection by defendant's road from Albany to Eagle Bridge and to Rutland is cut off. Passage for all north or east of Rutland may be had to Albany direct, by the way of Whitehall over the Rensselaer and Saratoga road, and from Rutland to Eagle Bridge, and thence by way of Troy to Albany; but a transhipment of

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freights is thus made necessary to cross the river at Albany, and a large increase of expense thereby necessarily incurred.

J. GIBSON and J. H. REYNOLDS, *for the motion.*

J. B. GALE, A. B. OLIN and W. A. BEACH, *opposed.*

PECKHAM, Justice. The complaint herein, on behalf of the people, asks for an injunction, and also prays that the defendant may be compelled by the decree of this court, to put its road in repair as to its eastern portion, and to operate the same. This case is novel in this country, and by no means free from difficulties.

By the present arrangement, the main purpose for which the defendant's road was originally constructed, is destroyed. Yet if no law has been violated, the remedy is not with the court.

Several objections are urged to this application, which I shall briefly consider: First. It is said that the people, through their attorney-general, have no right to bring this action. The contrary has been held in this court, in the *People agt. The Mayor, &c., of New York* (19 *How.*, 155), a case entirely analogous in principle, and I shall be governed by that decision. The following are also authorities in the same direction: *The People agt. The Mayor, &c., of New York*, an able opinion by Judge HOGEBOOM, on application for an injunction in reference to the Brooklyn ferry, also *Doolittle agt. Supervisors of Broome County* (18 *N. Y. R.*, 160; *s. c.*, 16 *How.*, 512).

It is next insisted that the defendant has a right to abandon any portion of its road whenever it chooses, and the public is without remedy; that there is no imperative direction by any statute requiring its continued operation, hence that this court has no power to compel defendant to repair its road. The defence has failed to find any statute authorizing a railroad company, absolutely at its pleasure,

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to abandon part of its road; and I am not aware of any common law, or inherent right to do so after the road is completed. The statute authorizes the directors of a road to change its route, or any part of it, by a vote of two-thirds of their whole members, if it shall appear to them that the line can be improved thereby. (2 R. S., 5th ed., p. 677, § 26.)

The defendant insists that at a meeting of "more than a majority" of its directors, on the 29th ult., they resolved to discontinue that portion of their road lying east of Johnsonville, in Rensselaer county. If this is claimed as an exercise of its right to change its route, it is a sufficient answer to say that it does not appear that the change was made by a vote of two-thirds of its directors, and the resolution was therefore void. But the resolution evidently refers to a *change*, not to a discontinuance of its route, or any part of it. This resolution recites that the track of defendant "is connected at Johnsonville with the track of the Troy and Boston road, and thereby the same points of termination are reached by railroad communication, that have been or may be reached by the present line of the road of this company," and as it is unprofitable and unnecessary for this company longer to operate that part of its road, &c., therefore it is resolved to discontinue it.

This resolution entirely fails to comply with the statute authorizing an agreement to be made by two companies, "embracing for a portion of their lines the same location of line," for the construction of so much of said line as is common to both, by one of said companies, and for the manner and terms upon which the business thereon shall be performed. Any road so connecting may alter and amend its articles of association, so as to terminate at the point of intersection, &c. These sections, especially the first, would seem to apply to roads not yet constructed, and an arrangement is to be made with the road constructing the single line, to do the business of the other for a certain distance on that

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line. (2 R. S., 5th ed., 693, 694, §§ 68, 69.) Here no arrangement of that sort is pretended. In fact it would be contradictory of the defendant's whole course of action, as it admits its intention to abandon and not operate any part of its road east of its junction with the Rensselaer and Saratoga road. Hence it could have no business to do at or near or east of Johnsonville, in regard to which it could make any agreement. There is a provision in the statute in regard to turnpike roads, authorizing them to discontinue any part of their road in the manner there pointed out. Thus by implication expressing the sense of the legislature, that such authority was necessary to that end. Authority is also given, upon certain terms, to railroads, by the section before referred to, to terminate their road at the point of intersection. This section, however, contemplates the substantial continuance of the road through another, and the same full accommodation of the public. The act is permissive, not prohibitory. The roads may terminate, not that they shall not terminate, thus evincing the sense of the legislature, that they could not otherwise change. These railroads are constructed for the public use. They are authorized to go over, occupy and own the land of any citizen, against his will, thus exercising the right of eminent domain, on the sole ground that such road is for the public use and benefit. In some cases lands are donated to them to aid in their construction. If they are for the public use, it would seem rational that the public should have some rights in respect to them after their construction.

It is laid down as a general principle, that there is an implied obligation on the part of the grantees of all franchises, to execute the conditions and duties prescribed in the grant. The grantee of the franchise of a ferry "is obliged to provide and maintain facilities for accommodating the public at all times with prompt and convenient pas-

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sage;" the public have an interest in such franchise. (3 *Kent's Com., title Franchise*, 458, 459.)

The statute provides that every railroad "shall start and run their cars for the transportation of passengers and property at regular times, to be fixed by public notice;" and shall take, transport and discharge such passengers and property on the due payment of the freight or fare legally authorized therefor, and shall be liable to the party aggrieved, in an action for damages for any neglect or refusal in the premises.

This provision seems to be plain and imperative. Railroads are common carriers in this state, and it is their duty to be ready and prepared at all reasonable times to transport freight and passengers.

Suppose a road, without necessity, ceases to run over a portion of its track for a week or a month, would that be any answer to an action for not transporting freight tendered for transportation? I think not. Would it be any better answer for the road to say it had concluded not to carry freight over that portion any more at all? If not, then this proceeding to tear up its rails, and to abandon transporting of persons and property on its eastern portion is a violation of its duty and of its charter.

Abandoning a portion of a road after large business interests have grown up in connection therewith, to further other rival interests of roads or communities, must operate disastrously and oppressively; and if done without authority, there should be, and I think there is a remedy in the courts to see that it is not done without imperious necessity.

If the obligation of the defendant be conceded to continue the operation of its road, I do not understand the right and power of the court to prevent the defendant by injunction from depriving itself of the power of fulfilling its chartered obligations in that respect, to be seriously contested.

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I think the power of the court is sustained both by principle and authority. I will refer to a single case in the court of king's bench, in England. In *Rex agt. The Severn and Wye Railroad Company* (2 *Barn. & Ald. R.*, 646), the railroad company, with a view of favoring a particular colliery, discontinued a branch of their road, and took up the iron thereon, the chief owners in the road having become interested in the favored colliery. The court, on application, unanimously granted a *mandamus* against the company to compel them to relay and operate their road. *Best, J.*, after alluding to speculators obtaining charters from parliament, under the idea of great public benefits, adds, "and where their sanction is obtained, is it to be permitted to those persons to say that they will do only that which is beneficial to themselves, and disregard entirely the interests of the public?"

It is urged here that the court should not interfere, because any one now has a right to make a road along the track proposed to be abandoned, under the general railroad act. The legislature had the power to grant that right to any one prior to the passage of the general law, so that the principle is unchanged. Since the decision of the supreme court of the United States, in the *Charles River Bridge Company agt. The Warren Bridge* (11 *Peters' U. S. R.*, 420), the power of the legislature on this subject has been unquestioned. Again, it is insisted that the defendant cannot operate its whole road without a loss, and without endangering its solvency. If that were so I should not interfere: no court would be justified in doing so; but I am not satisfied that such is the fact. There is great difference in the statements on this subject by the parties, and a decided impression is left upon my mind that the motive for abandonment is not apprehension of loss to the owners so far as respects this road. The proposition to lease and run the whole road for \$21,000 per annum, seems to have failed to command any attention from the defendant, though

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it would have paid a large interest upon the present owners investment. It seems to me the public interest demands the running of this branch of the road. The owners thought so in October last, and so declared in their articles of association organizing the road anew. It is said that a large portion of the rails will have to be removed in any event, even with the view of putting the road in order for operation. This I have no doubt is the fact, and the injunction should restrain the removal only of that portion not indispensably necessary to repair and refit the road for operation. In this modified form, in my opinion, the injunction should issue, and it is ordered accordingly.

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NEW YORK SUPERIOR COURT.

JOSEPH BURNETT and others, respondents, agt. EDWARD PHALON and others, appellants.

If a party is examined as a witness, his *refusal* to answer a *cross question, pertinent to the issue*, is his own act. It must entail upon him the loss of his testimony in his own favor, or may subject him to the usual compulsory process to compel a witness to testify if his adversary require it.

Whether a *referee* appointed merely to compute and report the damages sustained by the plaintiffs by reason of the violation of their trade mark, admitting he has the power to strike out the plaintiff's testimony in chief, for refusing to answer a pertinent question on cross-examination, has the power to issue *compulsory process* to require the plaintiff to answer. *Quere?*

The better practice is for the referee to give a *certificate* setting forth the questions, with the objections in detail of the witness to answering them, and his decision upon them, that the *court* may pass upon the remedy.

Where, however, the referee in such case struck out the plaintiff's testimony as to damages, for his refusal to answer a pertinent question on his cross-examination, and then *closed the case*, and thereby shut out all testimony on that question, which might have formed the subject of a general exception to the report; *held*, that an *exception* to this decision brought up the case to be regularly passed upon by the court.

A party is not privileged from answering a question which will reveal the *secret* of his trade; and such a question may be pertinent to the issue in an action for the infringement of a trade mark.

Burnett agt. Phalon.

Before all the Justices, October, 1860.

APPEAL from an order of Mr. Justice PIERREPONT, allowing exceptions to a referee's report, and referring the case back to him.

The action, as is stated by counsel, was for an invasion of the plaintiffs' right to the use of the word "Cocaine," with certain devices constituting a trade mark.

Judgment was entered in his favor, and by an order of the 3d day of May, 1859, an order was made of reference to take and state an account of the profits made and obtained by the defendants upon or by means of the article in said order referred to, and sold by them under the name of *Cocaine*, and to ascertain and report the amount of damages sustained by the plaintiffs by reason of the depreciation of the sale of their article of *Cocaine*, resulting from and in consequence of the infringement of the trade mark of the plaintiffs in said order adjudged, and all other damages which they might have sustained, and ought to be paid by the defendants, by reason and in consequence of such infringement of their said trade mark.

One of the plaintiffs was called as a witness before the reference on their behalf. After stating the amount of sales, he was asked what profits had been realized on the article sold, and answered \$1.40 on each dozen. On cross-examination, he was asked how he got at the profits per dozen, and replied, by estimating the cost of the materials, labor, &c. He was asked how he arrived at the cost, and to state particulars. The answer was, by estimating the cost of such material in bulk, finding what number of bottles contain a given quantity of campanino, adding labor, bottles, packages, cost printing labels, and dividing the cost by the quantity produced.

The question was then asked: in making up your estimate of profits, as you have given, what materials do you calculate the cost upon?

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The witness, under the advice of counsel, declined to name the materials of which the article "Cocaine" is composed; the witness stated that the composition of the article is a secret, having a considerable pecuniary value to his firm not known to the public.

The referee decided that the inquiry was pertinent to the matter presented by the plaintiff, and should be answered. The witness declined to answer. The referee decided that the witness was in contempt for not answering the question, and as a penalty that the subject of inquiry, to wit, the damages which the plaintiff claimed to have sustained by reason of any loss of profits upon sales made by him, or which they might have made of the article manufactured by them, but for any of the alleged acts of the defendants, be stricken out.

The defendants counsel still insisted on an answer to the question. It was decided not now to be pertinent, and the counsel excepted.

An exception was taken by the plaintiffs, on the ground that the referee erred in deciding that the plaintiffs, in estimating their profits upon the article Cocaine, were obliged to disclose the materials upon which the cost was calculated; that the inquiry was pertinent, and should be answered.

The plaintiffs also excepted to the decision that the plaintiff was in contempt for not answering, and as a penalty that the claim of the plaintiffs for damages should be stricken out of the case.

The referee reported that the plaintiffs had failed to prove any injury beyond mere nominal damages, to have been sustained by the plaintiffs by reason of any depreciation of the sale of their article of Cocaine, in consequence of any infringement of their trade mark by the defendant. In effect the report disposed of the whole case before the referee.

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Upon the exceptions being brought before the court, the judge, at special term, allowed both exceptions, and referred the case back to the referee to proceed under the order.

PIERREPONT, Justice. Under an order of reference like this, the referee has not the power to make the order to which the 12th exception refers.

I do not think that the witness could be compelled to reveal his secret of trade. I am quite clear that a tanner, or dyer, or other tradesman cannot be compelled to reveal the secret of his trade. Nor can the defendant, who infringes a trademark, force the plaintiff to reveal his trade secrets whenever evidence of damage is offered by the plaintiff. What effect this refusal to answer the cross-questions may have upon the evidence in chief, it is not necessary now to decide.

From this order the appeal is taken by the defendants.

E. W. DODGE, *for appellants.*

JOHN SHERWOOD, *for respondents.*

By the court, HOFFMAN, Justice. The Code has in all its provisions as to the examination of a party on his own behalf, treated it as an examination of a witness. It is now, as amended in 1860, as follows: a party to an action, &c., may be examined as a witness on his own behalf, or in behalf of any other party, in the same manner and subject to the same rules of examination as any other witness, except, &c.

It is stated in the books of practice that if a witness refuses to be cross-examined, his deposition shall be suppressed. The *Clerk's Tutor in Chancery* (p. 9) refers to a case, October, 1633, as deciding this. (*Hurd's Practice*, 346, n.; *The Practical Register*, p. —; and *Carsus Cancellariae*, 322.)

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Three cases are cited in *Hoffman's Ch. Pr.* (vol. 1, p. 463, n), in which it was declared to be the duty of the examining party to have the witness produced for cross-examination, and if he fail to do this the deposition may be suppressed. But the case of *Courtney* agt. *Hoskins* (2 *Russell R.*, 253) is also cited, and the head note is explicit, that if the witness refuse to be cross-examined, it is not reason for suppressing the deposition, as he may be compelled to submit to it.

The witness had attended and was examined, and no cross-interrogatories had then been filed. On a subsequent day the party seeking to cross-examine had a subpoena served upon him, which he disobeyed.

Whittick agt. *Lysaght* (1 *S. and St. R.*, 446) is an example of a case in which the fault of the party in not producing the witness to be cross-examined within the time fixed by rule of the court, led to the suppression of the deposition.

Raymond agt. *Perrin* (10 *Simons R.*, 179) is a case in which the neglect of the party moving to suppress, to take a course prescribed by the practice of giving a notice of an intention to cross-examine, was an answer to his application.

In *Flouriday* agt. *Collett* (*Dickens R.*, 288) one Delaport had been examined as a witness on the part of the plaintiff; before he was cross-examined he secreted himself. The plaintiff was ordered to procure him to attend and be cross-examined in a fortnight, or in default that his deposition be suppressed. A case of *Cason* agt. *Granger* is cited to the same effect.

And in *Beataugh* agt. *Beataugh* (1 *Hogan's R.*, 98) it was laid down that whenever a witness would not come forward to be cross-examined, the proper course is to move that he be produced to be cross-examined, or that the deposition already taken be suppressed.

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Spalding agt. *Brougham*, in the exchequer (2 *For. Ex. R.*, 158), and *Charlton* agt. *Robson* (*id.*) are to the point, that the producing party must have the witness brought up to be cross-examined (it is to be assumed within a reasonable time), or the deposition taken by him in chief shall be suppressed.

All the authorities concur that if the producing party is in any way in fault, if he fails in pursuing the regular practice as to retaining or producing the witness, the examination taken on his behalf shall not stand.

And it may be that if, without his fault, but solely from the fault of the witness, the cross-examination had not taken place, the same will be the result. In the old case from the *Clerk's Tutor* in chancery, it was said: "If a witness refuse to be cross-examined, it is cause of exception to his testimony, and the court will suppress his deposition, for it argues favor and partiality."

And Lord *ELLENBOROUGH*, in *Casenove* agt. *Vaughan* (1 *M. and Sel. R.*, 6) says, it is agreeable to common sense that what is imperfect—and if I may say so, but half an examination—shall not be used in the same way as if it were complete.

These authorities afford a clear guide and rule, to a certain extent, upon the present question. If the party is examined as a witness, his refusal to answer a cross-question is his own act. It must entail upon him the loss of his testimony in his own favor, or may subject him to the usual compulsory process to compel a witness to testify if his adversary require it.

But there are still two questions to be settled. Was the interrogatory put to him pertinent to the issue, and if so, was he privileged from answering it?

It was pertinent. The plaintiff sought to establish his claim by proving his loss of profits. To make this out he made an estimate of the cost of the materials used for a dozen bottles, and the price obtained for the same. The

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difference was profit. If he specified a given article to have cost a particular sum, and it was proven to have cost far more, the profit would be so much reduced. Hence the inquiry as to the articles was pertinent.

Was he privileged from answering the particular question?

The learned judge holds that he was not bound to reveal the secret of his trade. On what ground is this exception placed?

I have looked in vain for any direct authority to the point. Can the principle of the exemption, if it exist, be any other than subjection of the witness to a pecuniary loss?

The English statute of IV *George 3*, c. 37, was passed after the discussion in the case of *Lord MELVILLE*. Eight judges had held against four that a witness was bound to answer, though by so doing he might subject himself to a civil action, or charge himself with a debt.

Our own statute (2 *R. S.*, 406, 471) declares that any competent witness in a cause shall not be excused from answering a question relevant to the matter in issue, on the ground merely that the answer to such question may establish or tend to establish that such witness owes a debt, or is otherwise subject to a civil suit.

Mauran agt. Lamb (7 *Cow. R.*, 176) was a case after the English act, and before our own. The party in interest, the plaintiff's *cestui que trust*, was not compelled to testify against his interest.

So in *Cook agt. Spaulding* (1 *Hill R.*, 580), after our statute, it was held that the distinction between calling a party in interest and a witness whose answer might subject him to a civil suit, was cited upon and applied to a member of a banking association who refused to be sworn against them.

But the Code adopts the principle of a bill of discovery, and allows a party to be examined against his interest, as well as to be examined on his own behalf.

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In *Bull* agt. *Lovelace* (10 *Pick. R.*, 9) it was ruled that a witness was not exempted from answering, although the answer may affect his pecuniary interest.

I conclude that the witness had not the privilege he claimed; that the referee was right in his decision upon that point; and that the exception taken to his decision, and allowed by the judge, was not well taken. This was the eleventh exception.

But the referee was wrong in rejecting the claim absolutely, and preventing the plaintiff supporting it by testimony of another kind, after his own had been stricken out, if that was applied for.

It is to be noticed that the ordinary practice in cases of this description, is not for the referee to proceed and close the case, where a witness has refused to answer a question. From the authorities cited in *Hoffman's Master in Chancery*, (p. 60), in 1 *Daniel's Practice*, 920, *et seq.*; and from the case of *Taylor* agt. *Wood* (2 *Edward's Ch. R.*, 94); *Fokers* agt. *Meeker* (3 *id.*, 452); and *Mowatt* agt. *Graham* (2 *id.*, 13), it is to be deduced that the usual course is for the witness to state his objections to answering a question or questions, usually termed demurring to the interrogatories. These were to be reduced to writing, passed upon by the master if the case was before him. His certificate was presented to the court, which was applied to for process of attachment to compel an answer.

It was once held that the demurrer should be set down regularly for argument. A practice prevailed in our court of chancery for the party seeking the disclosure objected to, to move for compulsory process, and the court then determined the point. The proceedings were only suspended as to the particular point. The examination of the same witnessses, or other witnesses to other matters, might be had.

This practice was accurately pursued in the case of *Byass* agt. *Smith*, heard on appeal at the general term of

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this court, October 13, 1860. A referee was appointed to ascertain and report the amount of damages sustained by the plaintiff by reason of the defendants use of the plaintiff's trade mark. The plaintiff called the defendant, and in the course of the examination put to him various questions which he refused to answer. The referee gave a certificate setting forth the questions, his decision upon them (that they were proper and to be answered), and the refusal of the witness.

The ground of the objection was a tendency of his answers to subject the witness to a criminal prosecution for a misdemeanor, under ch. 123, § 3 of the laws of 1850.

An order to show cause why an attachment should not issue against him was then obtained. Mr. Justice ROBERTSON heard the application, and denied it, and his order was affirmed on appeal.

The objections were stated in detail in an affidavit used upon the motion. The usual course appears to be for them to be set forth on the face of the objection, and thus make part of the master's certificate. (1 *Daniel*, 920; *Bowman agt. Rodwell*, 1 *Mad. R.*, 266; *Strathmore agt. Strathmore*, 11 *L. R. N. S. Chan.*, 215; *Davis agt. Reed*, 5 *Simons R.*, 443.)

In the present case, however, as no objection has been taken upon this point of practice, and the referee shut out all testimony as to damages from a loss of profits, which might properly have formed the subject of a general exception to a report, we think the case may be regularly passed upon.

The 272d section of the Code, as amended in 1859, gives the same power to a referee to punish witnesses as for a contempt for non-attendance, or refusal to be sworn or testify, as is possessed by the court. It is urged with much plausibility, at least, that this is confined to cases in which the referee tries the case, a reference of all the issues in the cause, where he is substituted for the court. The resort

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to the court in this case was certainly proper. Indeed, the power of the referee in any case can only be concurrent.

Whether the defendant could obtain compulsory process to obtain an answer, or the plaintiff has a right to abandon his own evidence in chief, are questions not now before us.

The conclusion is, that the order appealed from must be modified by reversing so much of it as allowed the 11th exception, and affirming it in all other particulars, no costs of the appeal to be allowed to either party.

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SUPREME COURT.

LOUISA C. CARPENTER agt. ELIAS B. CARPENTER.

Where, on an application by the plaintiff for *alimony*, in an action of divorce, the pleadings and papers present a case of serious doubt of her ultimate success, the application will be *denied*.

Kings Special Term, March, 1860.

APPLICATION for temporary alimony.

LOTT, Justice. This application is made by the plaintiff, with full knowledge of the facts set up in the defendant's answer, charging her with dereliction in the discharge of her marital duties, and excusing his own conduct; and yet no affidavit is made in explanation or denial of these facts. Then, too, the acts of misconduct and abandonment set up in the complaint are, most of them, denied or explained by the defendant; and the principal allegations are explained by other parties who were witnesses to the transactions. Upon the whole, after a careful examination of the whole matter, I have come to the conclusion that there is too much doubt raised by the facts now presented, as to her right to ultimate relief, to justify me in extending to the

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plaintiff the relief she now asks, especially as it is clearly shown that the defendant's means are very small, and not sufficient to enable him to make an allowance to be of much avail to the plaintiff.

Application denied; order to be entered in Westchester county.

* * *

NEW YORK SUPERIOR COURT.

SHANKS agt. RAE and GENT.

Where, on motion of the defendant, a cause is put over the term (or circuit) on payment of costs of the term, to be adjusted by the clerk, a fee of \$10 for costs, subsequent to notice of trial and before trial, is properly allowed the plaintiff.

Where the defendant moves for a re-adjustment of such costs, and for leave to amend his answer, and the adjustment of costs is sustained, if he is allowed to amend his answer, he must pay all the costs of the term, with \$10, costs of opposing his motion to amend.

MOTION to amend answer and re-adjust costs.

The action was commenced in 1858, to recover the possession of personal property; the defendants appeared and answered the complaint by Robert Livingston, their attorney; the cause was placed upon the calendar, and reached at the June trial term, 1860, and on the application of the defendants the court made an order that the trial of the action go off for the term, on payment of the costs of the term, to be adjusted by the clerk, and to be paid by defendants on two day's notice. Under this order the clerk, in adjusting the costs, allowed the plaintiff for June term fee \$10, for proceedings subsequent to notice of trial, and before trial \$10. The defendant, Rae, moved to review this adjustment, upon the ground that the item of \$10 for proceedings subsequent to notice and before trial was not taxable, and also for liberty to amend his answer. The facts

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relating to the amendment are stated in the opinion of the court.

NELSON SMITH, *for motion.*

JOHN M. MARTIN, *opposed.*

By the court, Bosworth, Justice. The defendant, Rae, moves to amend his answer, so as to allege that the property which this suit is brought to recover, and which, as the complaint alleges, the defendants wrongfully detain, was taken by *Gent*, as constable, on an execution issued on a judgment recovered by Rae on the 4th day of June, 1854, against John Shanks, the plaintiff's father, for \$141.25, and that the transfer of it, under which the plaintiff makes title, is fraudulent and void.

The original answer of Rae avers "that he has been prevented and deterred from the collection of a judgment founded on a just claim against the said John Shanks," by reason of the matters stated in that answer. This averment indicates that the attorney supposed it was essential to a good answer, to set forth the judgment and possibly the execution; but it is silent as to any execution, and gives no description of the judgment. The defendant should be permitted to amend on paying \$10, of opposing this motion, and on stipulating that if the plaintiff shall, within ten days after service of a copy of the order to be entered herein, serve a notice of discontinuing the action, that the defendant waives all costs that have accrued between the time of serving the original answer and the time of serving such notice.

If the plaintiff's claim is just, and she chooses to proceed, she will recover the whole costs of the action. If it is unjust, and has been continued, relying on the imperfections of the answer as the grounds of expecting to recover, she should not be paid the costs of proceedings taken, relying solely on such grounds of recovery.

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Why permission is not also asked for the defendant, *Gent*, to file an amended answer, it is not easy to conjecture, as his answer merely denies "each and every allegation contained in the complaint," and does not attempt to justify under the judgment and execution. The fact that the proposed amended answer of *Rae* contains a positive denial of the allegations of the complaint, while the original answer only denies them on information and belief, I do not regard as an objection to allowing it, as it is better that the whole answer should be in one pleading rather than in *two*.

The portions included in brackets should be stricken out as irrelevant.

As to the costs of the June term, the cause went over the term on defendant's motion, and he was ordered to pay the costs of that term to be adjusted. The adjustment was regular, and I think the clerk was right in including \$10 for costs subsequent to notice of trial and before trial. (1 *Bosworth*, 644.) The further condition of granting leave to put in an amended answer must be imposed; that the defendants pay \$13, the residue of the adjusted costs.

SUPREME COURT.

CONRAD FLOYD agt. JOHN BLAKE.

An attachment, as a provisional remedy, may issue under the Code as well in an action of *tort* as in contract, whenever it is made to appear by affidavit that a cause of action exists against the person named as defendant, specifying the amount of the claim, the grounds thereof, and that the defendant is not a resident of the state, or has departed from the state to avoid the service of a summons, or keeps himself concealed therein with that intent.

Saratoga Special Term, September, 1860.

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Motion to set aside a warrant of attachment issued in an action of tort.

WESLEY GLEASON, for the motion.

G. F. BATCHELLER, opposed.

JAMES, Justice. It is conceded that this action is to recover damages for an assault and battery. It was commenced by the issuing and delivery of a summons for service, which the officer was unable to serve, and subsequently upon proof by affidavit, that the defendant had departed from the state to avoid the service of said summons, or kept himself concealed therein with like intent, a warrant of attachment was issued, by virtue of which certain property of the defendant was seized, and is held to answer such judgment as may be obtained against him.

The Revised Statutes only authorized attachments against "absconding, concealed and non-resident *debtors*," and the seizure of their real and personal property for the payment of *debts*.

The warrant of attachment given by the Code is not limited to debtors, nor to proceedings for the recovery of debts. It is general in its provisions, and to be in harmony with the general scope and purpose of the Code, must be held as extending to all actions for the recovery of money.

Under the Code the warrant of attachment is a provisional remedy, which the codifiers in their report declared to be "a remedy applied before judgment, with a view of rendering it effectual, whatever it might be, and to be applied at any time during the progress of the suit, and not alone at the commencement, as required by the Revised Statutes." And it was held in *Houghton agt. Ault* (16 *How. Pr. R.*, 79), that "an attachment under the Code was not a process for the commencement of an action; but an order for the arrest of the defendant's property, in the nature of

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bail, to secure the payment of such judgment as might be obtained against him."

In respect to the actions wherein an attachment may issue, the Code exhibits a wide departure from the provisions of the Revised Statutes. By the latter the attachment is given only against *debtors*, while the Code gives it in all actions for the recovery of money.

By the Code all forms of action are abolished; remedies in the courts are divided into actions and special proceedings, and an action is declared to be an ordinary proceeding in a court of justice. It then declares that "in an action for the recovery of money against a corporation created by or under the laws of any other state, government or country, or against a defendant who is not a resident of this state, *or against a defendant who has absconded or concealed himself*, or whenever any person or corporation is about to remove any of his or its property from this state, or has assigned, disposed of, or secreted, or is about to assign, dispose of, or secrete any of his or its property, with intent to defraud creditors, as hereinafter mentioned, the plaintiff at the time of issuing the summons, or at any time afterwards, may have the property of such defendant or corporation attached, in the manner hereinafter prescribed, as security for the satisfaction of such judgment as the plaintiff may recover" (§ 227); and "The warrant may be issued whenever it shall appear by affidavit *that a cause of action exists against such defendant, specifying the amount of the claim and the grounds thereof*, and that the defendant is either a foreign corporation, or not a resident of this state, or has departed therefrom with intent to defraud his creditors, or *to avoid the service of a summons, or keeps himself concealed therein with like intent, or*," &c. (§ 229.) It will thus be seen that this warrant is, by express terms, given in all actions for the recovery of money, and is nowhere limited to actions against debtors, or to such as arise on contract. These provisions can be applied

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as well in actions of tort as in actions of contract, and with as much propriety and justice. An action of assault and battery is as much an action for the recovery of money as an action for the breach of a contract, and the amount claimed and the grounds thereof can as well be stated in the former case, and with as much certainty as can the claim for unliquidated damages in the latter; and if in an action of slander, or assault and battery, the defendant be a non-resident of the state, or if a resident, and has departed therefrom with the intent to avoid the service of a summons, or keeps himself concealed therein with that intent, a case is brought within the very letter and spirit of the Code, which authorizes a warrant of attachment.

The poet has said:

"He who steals my purse, steals trash; 'tis something, nothing.
'Twas mine, 'tis his, and has been slave to thousands;
But he that fiches from me my good name,
Robs me of that, which not enriches him,
And makes me poor indeed."

If a good name is so much more to be desired than riches, why should not the law afford the same facilities for enforcing a judgment for an assault upon character that it does for an assault upon the purse?

It was urged that in the one case the defendant might be arrested and held to bail, while he could not in the other. It is true that in the one case the order of arrest may go forth, but it is not always effectual. If the defendant be a non-resident, or absent from the state, or keeps himself concealed within it, the order would be of no avail. In such case a defendant with large property within the state might set a plaintiff at defiance, and through the instrumentality of agents, remove or dispose of his property at his convenience, at any time before judgment.

I am therefore of the opinion that an attachment, as a provisional remedy, may issue as well in actions of tort as in contract, whenever it is made to appear by affidavit that

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a cause of action exists against the person named as defendant, specifying the amount of the *claim*, the grounds thereof, and that the defendant *is not a resident of the state, or has departed from the state to avoid the service of a summons, or keeps himself concealed therein with that intent.*

Motion denied, with \$10 costs.

NOTE.—This question seems to involve the construction of one or two other sections of the Code, with §§ 227 and 229: That is, what is the true meaning of the words, "In an action for the recovery of money," mentioned in § 227? and in § 229, where it says "that a cause of action exists," evidently meaning a cause of action for the recovery of money, as stated in § 227, because they must be construed together. In § 129 of the Code, requiring a notice to be inserted in the summons, it says in the first subdivision: "In an action arising on contract for the recovery of money only," &c.; and in the third subdivision of § 129, in reference to a demand of relief in the complaint, it says: "If the recovery of money be demanded, the amount thereof shall be stated," meaning the amount of money, not of *damages*.

In regard to the construction put upon these words in § 129, as above stated, it was held in a very well considered opinion, in the case of *Tuttle agt. Smith* (14 How., 395), and which has been frequently cited with approval, and concurred in, that the phrase "for the recovery of money only," must be construed to mean the recovery of a *definite sum of money as such*; that whenever the action requires the determination of amounts unliquidated in their nature, requiring other proof, and depending upon other considerations than such as appear in the contract itself, then the action is not for the recovery of money only, as money due and payable by the contract on which the action arises. It is rather an action to establish and ascertain the plaintiff's right to *damages*, which are to be paid and satisfied in money.

If this construction is applicable to §§ 227, 229, in reference to the issuing of attachments, it will undoubtedly be considered a narrow and illiberal construction, and in many instances may defeat substantial justice; and, besides, it is right in the teeth of the decision of *Ward agt. Begg* (18 Barb., 139), where the general term in New York sustained an attachment issued in an action for the specific performance of a consignment of goods as security to the plaintiff for a guaranty made for the defendant; evidently resting their decision on the wording of § 229, without any reference to or connection with § 227. But with the harmonious and beautiful provisions and proportions of the Code the profession are familiar. The principal object in their application seems to be to get at "what is intended."—R.E.P.

NEW YORK PRACTICE REPORTS.

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SUPREME COURT.

CHARLES McWILLIAMS agt. JOHN LONG, CORNELIUS POILLON
and ALEXANDER C. POILLON.

If a party contracting to convey real estate on a certain day, desires to rescind his contract, or to hold the opposite party to *performance* on the day appointed, he must not only have his deed prepared, but *properly executed*, ready for delivery. It seems, that the *time of payment*, the day of performance mentioned in the contract, is not an essential ingredient in, or inducement to the execution of the contract (to convey land), and may be performed within a *reasonable time*. (See 7 Paige, 22.)

Where a party contracting to purchase real estate, and to make payment on a particular day, makes his tender of payment on the next day, which is refused, although such payment might be considered in time, and the party entitled to specific performance by acting *promptly*, yet if he slumbers in that position for some five years he loses his relief in that shape; his remedy, if any, is by an action for damages.

New York Special Term, April, 1860.

ACTION to set aside an agreement to convey real estate, as a cloud upon the title.

SICKLES and CUSHING, *for plaintiff.*

J. C. LEVERIDGE, *for defendants.*

LEONARD, Justice. The plaintiff brings this action to be relieved from an agreement between himself and the defendant (Long), for the sale of a lot of land at the corner of Broadway and 67th street, made March 9, 1851, which the defendant, Long, assigned to the Messrs. Poillon, and which was recorded April 5th, 1851, and is a cloud, as the plaintiff alleges, upon his title, and prevents him from improving or selling his lot. He alleges that he has always been ready, and has offered to perform the agreement on his part, but the defendants neglect and refuse.

The defendants, admitting the agreement, assignment and record, deny the other facts on which the plaintiff claims relief.

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The Messrs. Poillon allege a tender of performance, and a continued readiness on their part, and demand specific performance.

The allegations constituting a counter-claim are all put at issue by the plaintiff's reply.

The plaintiff, and the defendants, except Long, who claims no interest in the question, have respectively been examined as witnesses in their own behalf, and they are entirely at variance in respect to tenders and offers of performance which the defendants, Cornelius and Alexander C. Poillon, claim to have been made by them to the plaintiff.

It is not disputed, however, that the plaintiff was notified at his residence on the premises in question, on behalf of these defendants, to attend at the office of their attorney on the day appointed for the consummation of the agreement, for the purpose of carrying it into effect, and that the plaintiff, with his wife, did attend at the place requested, with a deed of the premises duly prepared and ready for execution, between the hours of two and three o'clock P. M. on that day. That the defendant, Alexander C. Poillon, met the plaintiff there shortly after three o'clock, P. M., and that the plaintiff showed him the deed, to which no objection was made, and declared himself ready to execute it, together with his wife, and to deliver it when he saw the money which was to be paid to him.

That the defendant, Alexander C. Poillon, showed the plaintiff a check on a bank in this city for the amount due, and offered to deliver it in payment; that the plaintiff refused so to receive it, and insisted upon payment in money.

That the plaintiff, by agreement with the said Alexander C. Poillon, waited at the house of a friend who resided near the said office, in company with his wife, till about nine o'clock, P. M., to receive the money due him, and to execute and deliver the said deed. That the attorney of the said defendants during the evening offered on their

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behalf to pay the amount due, partly in gold and partly in his own bank checks, but the offer was declined. This offer was made to the plaintiff's wife, but the plaintiff was in an adjoining room, and the offer was probably declined by his authority. No other offer of performance was made by either party after the plaintiff arrived at the office of the defendants' attorney, on the day when performance was due by the terms of the contract.

The defendant, Cornelius Poillon, testified at the trial, in behalf of the defendants, that at about half-past eleven o'clock, A. M., of the day when the contract was to be performed, he tendered to the plaintiff the sum of \$1,450 in gold at the premises in question, and demanded a deed for the land. That the plaintiff refused the money, and said he had made up his mind not to sell his land. That no one except the plaintiff and his wife, and he thinks two or three small children were present, besides himself.

The defendant, Alexander C. Poillon, also testified at the trial in behalf of the defendants, that he, in company with Mr. Kellum, went to the residence of the plaintiff at the premises in question on the next day after the interview at the office of the defendants' attorney, with the amount due to the plaintiff in gold, or gold and silver, and tendered it to the plaintiff, and demanded a conveyance of the land. That the plaintiff refused to receive the money or make the deed, because payment had not been made at the time appointed in the contract.

Mr. Kellum also testified in behalf of the defendants, that he was present and saw the tender last mentioned, but he did not know the amount tendered.

The plaintiff, testifying as a witness in his own behalf, denies the truth of both these statements. He testifies that he never saw the defendant, Cornelius Poillon, until the time of the trial. That neither Cornelius nor Alexander ever made any tender of payment at his residence at any time or in any manner.

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The plaintiff has not established a case entitling him to any relief. If he desired to rescind this contract, or to hold the defendants to performance on the day appointed, it was his duty to have his deed prepared and executed. His wife might possibly have refused to sign it, as he had agreed she should, and thus put it out of the plaintiff's power to perform his part of the agreement. This prerequisite to declaring the contract forfeited or rescinded as against the defendants is wanting. Whether the plaintiff had any right to claim that performance could not be demanded by the defendants after the day appointed by the agreement, it is not necessary to decide, although I am of opinion that the time of the payment was not an essential ingredient in, or inducement to the execution of the contract, and might therefore be performed within a reasonable time after the day named. (*Wills agt. Smith*, 7 *Paige R.*, 22.)

I consider the evidence as to the tender testified to by Cornelius Poillon as balanced by the counter-testimony of the plaintiff. It is certainly singular that no reference was made to this transaction at the subsequent interview at the office of the counsel for the Messrs. Poillon, or that when an interview had been appointed to take place on the same day at the office of their counsel, that they should not have on hand the same gold with which the tender had previously been made, although the defendants did not make their appearance, or know of the plaintiff's arrival, till just as the time for closing the banks had arrived.

The evidence of the tender made by Alexander C. Poillon on the next day, was corroborated by that of Mr. Kellum, and this fact is to be assumed as established in favor of the defendants.

The length of time which elapsed before the defendants, Cornelius and Alexander C. Poillon, made their claim in court for a specific performance of this contract, has however debarred them from the relief which they claim.

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Assuming that the tender which was made by Alexander C. Poillon on the 3d of June, 1851, was in time, and gave the defendants the right to then demand the aid of a court of equity to compel the plaintiff to convey to them the land, it does not follow that they can slumber in that position for five years, to ascertain whether the price of the land appreciated or declined, and then invoke the same relief from a court of equity. This relief, if desired, should have been sought promptly. The defendants must therefore take their remedy, if any, by an action for damages.

There was no relief sought by the complaint in any manner affecting the rights of the defendant, Long, injuriously, and there was no occasion for him to have defended.

The complaint and the counter-claim are therefore dismissed, without costs to either party as against the other.

SUPREME COURT.

THE PEOPLE *ex rel.* LUCIUS A. HOVEY and LUCIUS A. HOVEY
agt. ORSON AMES.

By the statute of 1847 (*Session Laws 1847, ch. 498*, which is constitutional) the legislature provided that the boards of supervisors might limit the number of county *superintendents of the poor* to *one*, and that when no resolution to that effect was passed, the number should be *three*. If, therefore, a board of supervisors pass a resolution, under this statute, declaring that thereafter there shall be but *one* superintendent of the poor for the county (there being three at the time), they have no power thereafter, by resolution or otherwise, to declare that thereafter there shall be *three* such superintendents elected for the county. They have power only to *reduce* the number, none to *increase* it after it is reduced.

If under a resolution to restore the number from one to three, an election is had, and three candidates are voted for, the election is void, because the resolution authorizing it is a *nullity*.

And when but *one* person can be elected to an office, and *three* persons are named on the same ballot, the ballot is void.

General Term, Syracuse, October, 1860.

People agt. Ames.

Present, ALLEN, MULLIN and MORGAN, Justices.

THIS is an action brought by the attorney-general in the nature of *quo warranto*, for the purpose of obtaining a judgment ousting the defendant, Orson Ames, from the office of county superintendent of the poor, in and for the county of Oswego, and also declaring the relator, Lucius A. Hovey, entitled thereto. The action was commenced by the service on the defendant the usual summons and complaint. The defendant answered the complaint, denying each and every allegation therein contained, and pleading special matter. No question arises upon the pleadings. The cause came on for trial at the circuit court, held in and for the county of Oswego, on the 3d Monday of May, 1860, at the court house in the city of Oswego, before the Hon. W. F. ALLEN, justice of the supreme court, and a jury. The facts of the case were admitted by the counsel of the respective parties to be as follows:

Previous to 1855 there had been elected within the county of Oswego three superintendents of the poor, whose respective terms of office had been determined by lot by the clerk of said county. At the annual session of the board of supervisors of said county, held on the 30th day of November, 1855, at Pulaski, in said county, the following resolution was duly adopted by said board, viz.: " *Resolved*, And be it hereby enacted, that there shall be but one superintendent of the poor for the county of Oswego, and that in accordance with an act passed December 16th, 1847, there shall not be hereafter elected a superintendent of the poor until the general election, to be held in the year 1858, unless such office should be vacated." At the annual session of said board, held November 24, 1857, at Fulton, in said county, the following proceedings were had, viz.:

Mr. Hill, a member of said board, offered the following resolution:

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"Resolved, That the number of superintendents of the poor for this county, and hereafter to be elected, be and is hereby fixed at two.

"Resolved, That a copy of the foregoing resolution, duly authenticated, be furnished the secretary of state, and the clerk of this county, by the clerk of this board."

Mr. Alvord, a member of said board, moved to amend the first resolution offered, by making the number of superintendents of the poor three, and that one be elected from each assembly district. Amendment carried. The resolutions as amended were then adopted. During the year 1858, Loren Golding was the sole superintendent of the poor in said county, none having been elected during the years 1856 and 1857.

At the annual election held in November, 1858, in and for the county of Oswego, six or more persons were voted for by the electors, for the office of superintendent of the poor, in and for said county. Of the votes so given, Orson Ames received 6,639; Loren Golding received 6,599, and John Sayles received 6,497, and the votes for each of whom were more votes than were received by any other person. The board of county canvassers for that year declared them duly elected as such superintendents, all three of whom duly entered upon the discharge of the duties of such office January 1, 1859. The clerk of said county having determined by lot that said John Sayles should hold said office for three years, the said Loren Golding for two years, and the said defendant, Orson Ames, for one year, from the last day of December, 1858. That all of said county superintendents continued to discharge the duties of said office until the morning of the 7th day of November, 1859, when the said John Sayles died.

A general election was held in and for said county on Tuesday the 8th day of November, 1859, being the next day after the death of said John Sayles, for the election,

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among other officers, of county superintendents of the poor, at which election 11,731 votes were cast for the office of superintendent of the poor, of which Burton E. Sperry received 6,786, and Andrew Coe received 4,902; also at said election 3,908 votes were cast "for superintendent of poor, to fill vacancy," of which 2,707 were cast for Lucius A. Hovey, 1,143 were cast for William F. Ingall, and 52 were cast for Orson Ames, at which election no votes were cast for superintendent of poor, to fill vacancy within the following towns and election districts in said county, viz.: Albion, Boylston, Orwell, Redfield, Sandy Creek, Williams-town, West Monroe, Constantia Election District No. 1, and in Granby Election District No. 2, all of which was certified to the county canvassers by the inspectors of election of the several election districts in said county. That the votes last aforesaid were counted by said county canvassers, but said canvassers refused to allow the said votes so given to fill vacancy, and declined to give said Hovey a certificate of election to said office. That on the morning of the 5th day of December, 1859, the defendant, Orson Ames, made and executed in writing his resignation of the office of county superintendent of the poor, and on the same morning mailed the same in the post-office in Oswego city, directed to the secretary of State at Albany, which resignation was filed by the secretary of state on the 6th day of December, 1859.

At the annual meeting of said board of supervisors of said county, held at Oswego city on the 5th day of December, 1859, at the evening session thereof, commencing at 7 o'clock, P. M., twenty-four supervisors only then being present, the following proceedings, resolutions and ballots were had, viz.:

The following resolution was adopted, to wit:

"Resolved, That we now proceed to an informal ballot for a superintendent of the poor, to fill the vacancy occa-

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sioned by the death of John Sayles, Jr. The informal ballot was then taken with the following result: whole number of votes cast, 24. For Orson Ames, 13; for L. A. Hovey, 9; for W. F. Ingall, 1; A. P. Hart, 1.

“On motion of Mr. Mann,

“*Resolved*, That we now proceed to ballot for a superintendent of the poor, to fill the vacancy occasioned by the death of John Sayles. Carried.

“The ballot was then taken with the following result: The whole number of ballots cast was 24, as follows: for Orson Ames, 12; L. A. Hovey, 11; blank, 1; whereupon the chairman declared that Orson Ames was duly appointed superintendent of the poor to fill the vacancy occasioned by the death of John Sayles.”

The said defendant, Ames, on the 8th day of December, 1859, took and subscribed the usual oath of office, and filed the same in the clerk’s office of Oswego county, together with the usual bond as in such case required, and entered upon the duties of such office, and has continued to act as such county superintendent of the poor for said county ever since. That the aforesaid Loren Golding has continued to act as such county superintendent of the poor since January 1, 1859, and said Sperry since January 1, 1860.

On these facts, the court, by consent of the parties, ordered a verdict for the plaintiffs; first, that the superintendent has usurped, and unlawfully held and exercised the said office of superintendent of the poor since January 1, 1860, and still does so unlawfully hold and exercise the same, and that he be ousted and removed therefrom; and second, that the said plaintiff, Lucius A. Hovey, is entitled to the said office, and the rights and emoluments thereof, and has been so entitled to the same since January 1, 1860, subject to the opinion of the supreme court, at a general term, on a case to be argued in the first instance at a gene-

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ral term of the court, with leave to either party to turn the same into a bill of exceptions.

R. H. TYLER, *for plaintiff.*
D. H. MARSH, *for defendant.*

By the court, MULLIN, Justice. There can be no doubt of the constitutional power of the legislature to provide for the election of county superintendents of the poor, to provide that a vacancy may be filled either by election or by appointment by the board of supervisors, and to vest in such board the power to declare whether their respective counties should have one or three superintendents. In pursuance of the power conferred by the constitution, the legislature provided (*Laws of 1847, ch. 498*) that the boards of supervisors might limit the number of superintendents to one, and that when no resolution to that effect was passed, the number should be three. Section 2 provides for the election of such superintendent or superintendents at the general election in November, 1848, in the same manner as other county officers. Section 4 provides that vacancies in such office shall be filled by appointment by the board of supervisors.

In Oswego county three superintendents had been elected prior to 1855. On the 30th November of that year, the board of supervisors passed a resolution declaring that thereafter there should be but one superintendent of the poor, and that none should thereafter be elected until the general election in 1858, unless a vacancy occurred.

This resolution did not operate to reduce the number until January, 1857. At that date only two were in office, and on the 1st January, 1858, only one was in office. That one was Loren Goulding, and his term of office expired the 31st December of that year.

In November, 1857, the board of supervisors, at their annual meeting, passed a resolution declaring that the num-

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ber of superintendents thereafter elected should be three, and that one be elected in each assembly district. In pursuance of this resolution, at the general election in November, 1858, three persons were elected superintendents, and entered on the duties of their office on the 1st January, 1859.

The question now arises whether the supervisors had power to recall their first determination, reducing the number to one, and to declare that thereafter three should be elected.

There is not a word in the act of 1847 which confers the power to reduce the number of superintendents, which can be construed into a recognition of the authority of the board to increase the number after they have reduced it.

In 1854 the legislature provided (*Laws of 1854, ch. 188, § 1*) that when any board should resolve that but one superintendent should be elected, the person elected at the next general election should be the superintendent for three years from the 1st of January next after his election; and one should be elected triennially thereafter. By the 2d section of the same chapter, it is provided that when there are more than one superintendent in office at the time of the passage of a resolution reducing the number, such resolution shall not affect those then in office, but the places of those having one or two years to serve should not be filled.

The board of supervisors are acting under delegated powers; they are confined to those powers, actually conferred; they take nothing by implication; and hence when a power is given to them to reduce the number of the incumbents of an office, it does not authorize them to increase the number.

It seems to me that when the board has passed a resolution to reduce the number, their power over the subject is wholly at an end.

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If I am right, then the resolution of November, 1857, is a nullity, and but one superintendent could thereafter be elected.

Inasmuch as but one could be voted for at the election in November, 1858, and as three were declared elected, and entered on the duties of the office, no one was elected, or declared elected, to succeed Loren Goulding, whose term expired the 31st December of that year. When but one person can be elected to an office, and three persons are named on the same ballot, such ballot is void.

So when three persons are declared elected to an office which but one can fill, there is no way of determining which one of them was elected, hence neither is entitled to the office.

Although Goulding's term of office by election expired on the 31st December, 1859, yet no person has been legally elected to succeed him.

By § 40, 1 *R. S.*, 5th ed., 413, a vacancy exists in an office when either of the following events occur before the expiration of the term of such office :

1. By death of incumbent ; 2. His resignation ; 3. His removal from office ; 4. His removal from the county ; 5. His conviction of an infamous crime ; 6. His refusal or neglect to take oath of office or give bonds ; 7. The decision of a competent tribunal declaring his election or appointment void.

There was no vacancy, within this section, for the board of supervisors to fill. The term of office expired by its own limitation, and no one was elected to fill the office as successor to the retiring officer.

Goulding therefore either held over, or the office became vacant. I find nothing in the statute authorizing this officer to hold over, and of course the legal title to the office ended with the term to which he was elected.

None of the persons elected in the fall of 1858 acquired any legal right to the office, and it only remains to inquire

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whether anything has occurred which gives a right to either the relator or defendant to the office.

If neither Ames, Goulding nor Sayles acquired any title to the office by the election of 1858, no vacancy could be created by the death of Sayles. He was in without color of right, and his death could not create a better right to the office than he had himself during his life.

So also Ames' resignation could not create a vacancy which could be filled by either election or appointment.

No vacancy having occurred in said office which the supervisors could fill, and as the term of office of Goulding expired on the 31st December, 1858, the people alone could select the successor. This was not done in 1858 in a legal manner; but in 1859, it appears by the case, at the general election votes were cast for superintendent of the poor, and Burton E. Sperry had the greatest number of votes, and it appears by the case that he has acted since the 1st January, 1860. He is, in my opinion, the only superintendent of the poor of the county of Oswego. Because,

- 1st. He has been legally elected to that office.
- 2d. No vacancy has ever existed since the passage of the resolution by the board of supervisors in 1855, which that board could fill.

The court ordered judgment for the people, ousting the defendant, Ames, and declaring the relator, Hovey, not entitled to the office, without costs to either party.

Gould agt. Torrance.

SUPREME COURT.

ANTHONY GOULD and others agt. JARED S. TORRANCE and others.

Where a justice of this court makes an order in *supplementary proceedings* for the examination, before a referee, of judgment debtors residing within his district, the judgment being docketed and the venue laid in another judicial district, an order made by such justice denying a motion to set aside the order of reference should be entered, and the appeal therefrom heard in the district where the *venue in the judgment* is laid.

Albany General Term, September, 1860.

Present, GOULD, HOGEBOOM and PECKHAM, Justices.

An order in supplementary proceedings was made by Hon. NOAH DAVIS, Jr., a justice of this court, residing in the eighth district, on the 24th day of February, 1860, appointing Dennis Bowen, Esq., of Buffalo, referee, and ordering defendants to appear before said Bowen on the 28th day of February, 1860, for examination. On the 29th day of March, 1860, defendants made a motion before Justice DAVIS, at Chambers, in Erie county, for an order vacating said order of reference. The motion was denied, and the order was at first entered in Erie county. Afterwards the plaintiffs filed and entered the order with the clerk of this (Albany) county, June 4, 1860. Defendants appealed by giving the requisite notice. The plaintiffs now move the appeal for argument. Defendants object, preliminarily, to its being heard here, insisting that it should be heard in the eighth district. The venue was laid in Albany county, where the record of judgment was filed, and still remains. The defendants reside in Erie county, where the examination was ordered by Justice DAVIS to be heard.

OTIS ALLEN, for plaintiffs.

J. K. PORTER, for defendants.

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By the court, PECKHAM, Justice. It is decided that proceedings supplementary to execution are proceedings in the cause; a sort of additional or equitable execution, that penetrates further than an ordinary execution. (*Bank of Genesee* agt. *Spencer*, 15 *How.*, 412; *Ross* agt. *Clussman*, 3 *Sand.*, 676.) I do not think it would be claimed that a motion could be made to set aside an execution in any other district than that in which the venue is laid. It clearly should be made there. Some inconvenience may attend this rule, but much confusion would follow any other. I am of opinion that the appeal is properly brought here, and must be heard upon its merits.

NEW YORK COMMON PLEAS.

JOHN D. LEWIS and others agt. HERMAN FOX.

The marine court of the city of New York, on review upon *appeal* at general term of the judgments rendered by any of its justices, can only allow the same *costs* and *disbursements* on such appeals, as on appeals from justices' courts to this court. These costs and disbursements are specified in § 371 of the Code. And this is so, notwithstanding that by a rule of the marine court an appellant is required to *print his case and points* upon an appeal taken to the general term.

New York General Term, October, 1860.

Present, DALY, BRADY and HILTON, Judges.

THIS case came up before the general term of the common pleas, on appeal from the marine court.

By the court, HILTON, J. This action was commenced in the marine court, by warrant of attachment issued by one of the justices of that court, under the provisions of the §§ 31 and 35 of the act to abolish imprisonment for debt, &c., passed April 26, 1831. On the return of the warrant the plaintiffs had judgment, which on appeal to

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the general term of that court, was reversed, and judgment finally given for the defendant, upon the ground, as it seems, that the affidavit on which the attachment was granted did not state sufficient to authorize the issuing of such a process, and therefore the court acquired no jurisdiction of the suit. On the reversal the general term awarded the defendant \$48.96 costs and disbursements, and for which judgment has been entered.

The plaintiff having appealed, asks us to review the judgment in respect to the sufficiency of the affidavit referred to; and also as to the right of expenses incident to the filing of any transcript of the judgment. The items mentioned in § 371 of the Code, added to the justice's fee of \$2 for his return, constitute all the fees of officers and disbursements which can be allowed by us on appeal from justices' courts; and it follows that the marine court cannot, under the provisions of the act of 1853, referred to, allow any other.

But it is said that by a rule of that court, an appellant is required to print his case and points upon an appeal taken to the general term, and that this expense must therefore be considered as a necessary disbursement, to be allowed as part of the costs to be awarded in the final judgment.

Our only answer to this is, that the legislature has restricted this court in the amount of costs and disbursements which we may award upon appeals from justices' courts and the marine court, as already shown, is restricted in like manner and to the same extent. By § 365 of the Code, we are required to hear all such appeals upon the original papers, and it is therein expressly declared that no copy need be furnished for the use of the court. A provision of so positive a character we have always supposed denied the marine court the power to award the costs thus imposed upon the plaintiff.

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Upon the first ground stated, we are of opinion that the affidavit was clearly insufficient to justify the issuing of the attachment, and the marine court was right in so holding.

As to the second, a brief reference to the several statutes upon the subject of costs in the marine court, will show that the sum allowed is much beyond the power of that court to award to a respondent upon appeal in any case. The act of July 21, 1853 (*Laws* 1853, p. 1165), under which the marine court derives the power to review, upon appeal at general term, the judgments rendered by any of its justices, allows the same costs and disbursements on such appeals as on appeals from justices' courts to this court; and these are specified in § 371 of the Code, which provides that there shall only be allowed, on such appeals, to the appellant on reversal \$15, and to the respondent on affirmation \$12, with the fees of officers and disbursements in addition, and which consist of the sheriff's or constable's fees, and the sums paid to the clerk during the progress of the cause, or for any copies of papers made by him, and necessary to be procured, together with the right to impose upon either party to such appeals any expense, in the way of either copying or printing of papers to be used on the argument of the appeals before us; and we have no doubt that if we should require such an expense to be undergone, the party incurring it would not be entitled to have it allowed him as a disbursement within the meaning of § 371.

Entertaining these views, we are of opinion that in the present case the marine court has exceeded its powers, by giving judgment in favor of the defendant for a greater amount of costs and disbursements than the law authorized. The judgment must therefore be reduced to the costs and disbursements which are usually allowed in this court, and thus modified, it will be affirmed, without costs of this appeal to either party.

Barnes agt. Willett.

SUPREME COURT.

GEORGE BARNES and others agt. JAMES C. WILLETT,
sheriff, &c.

Does the abolition, by the Code, of the *forms* of actions as heretofore used, necessarily in all cases abolish the *names* of such actions?

For instance, in an action against a sheriff for an *escape*, which formerly might have been an action of *debt*, under the statute, or of *case*, at common law, where the plaintiff alleged the requisite facts charging the prisoner in execution, his arrest, detention and subsequent escape from the sheriff, and rests his right to recover the *precise amount of the judgment*, with the costs of the action, upon the statute, and claims only such amount, is it a violation of the statute to call such an action an action of *debt*?

If not, the statute in such action fixes the extent of the sheriff's liability at the amount of the debt, &c., for which the prisoner was committed; and the sheriff can not, as a defence, or in mitigation of damages, give evidence of the insolvency or poverty of the prisoner, or of any other circumstance to show that the plaintiff had lost nothing by the escape. If the action was *case*, the plaintiff might recover *damages*, more or less than the judgment, and the sheriff might in his defence, or in mitigation of damages, give such evidence.

New York Special Term, September, 1860.

DEMURRERS to answer.

A. MATHEWS, *for plaintiffs.*

A. J. VANDERPOEL, *for defendants.*

SUTHERLAND, Justice. The statute (2 R. S., 437, § 63) gave an action of *debt* against the sheriff for an escape from final process, and declares that in such action the sheriff shall be answerable for the debt, damages, or sum of money for which the prisoner was committed.

The statute did not take away the common law remedy for the escape by action on the *case*.

Before the Code, if the action for the escape was *debt*, the plaintiff was limited in his recovery by the express words of the statute, to the amount of the original judgment.

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The statute fixed the extent of the sheriff's liability at the amount of the debt, &c., for which the prisoner was committed. If the action was debt, the sheriff could not as a defence, or in mitigation of damages, give evidence of the insolvency or poverty of the prisoner, or of any other circumstance to show that the plaintiff had lost nothing by the escape.

If the action was an action on the case, the plaintiff recovered the damages sustained by him, which might be more or less than the judgment, and in such action the sheriff might give in evidence circumstances to show that the plaintiff had lost nothing, or in mitigation of damages. (*Ransom* agt. *Dole*, 2 *John.*, 454; *Thomas* agt. *Weed*, 14 *id.*, 255; *Littlefield* agt. *Brown*, 1 *Wend.*, 401.)

The Code (§ 69) has abolished the *form* of the action of debt, but it has not abolished or repealed the provision of the statute before referred to, giving to the party at whose suit the prisoner was committed a right to recover for his escape from final process, irrespective of the question of the actual loss or damage, the amount of the original judgment or recovery, precisely, as a penalty for the carelessness or misconduct of the sheriff. (Code, §§ 468, 471; *Hutchinson* agt. *Brand*, 5 *Seld.*, 209.)

The Code has not abolished, and could not very well have abolished, the distinction between *mesne* and *final* process. These terms have been dropped by the Code, but the distinction in fact remains.

In this case the plaintiffs, by their complaint, after alleging the recovery of their judgment for \$6,089.61, the amount of their debt and costs, facts to show their right to issue an execution thereon against the person of Jacob Cohen, one of the judgment debtors, the issuing of such execution, his arrest, detention and subsequent escape, allege that thereupon the judgment remaining wholly unpaid, the defendant in this action, sheriff, &c., became indebted to them in the said sum of \$6,089.61, the amount

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of said judgment, and claim to recover *that sum*, with costs.

Although the Code does not call this an action of debt, and perhaps we are not permitted to call it by that name, yet it is plain that the plaintiffs rest their right to recover the precise amount of their judgment, with the costs of this action, upon the statute; and that we should look upon the action as an action under the statute for their debt, the judgment, and not as an action at common law to recover damages.

The abolition by the Code of the form of the action of debt, has certainly not taken away the plaintiffs' right to recover for the escape, under the statute; and if they have this right, how can they state their cause of action under the Code, otherwise than by stating the facts which show their right to recover under the statute, and by claiming to recover precisely what the statute authorizes them to recover?

I think it plain that this action should be looked upon as an action of debt under the statute, and that the defendant, notwithstanding the abolition of the forms of action by the Code, had not a right to set up as a defence thereto the matters set up in the 8th, 9th, and part of the 10th folios of his answer as a second defence.

It is plain, too, I think, that the matters set up by the defendant in his answer, as a third defence, constitute no defence.

How can the sheriff in an action for an escape, protect himself from the consequences of his own wrong act or neglect, by setting up the wrongs which the escaped prisoner may have suffered at the hands of his judgment creditor? (*Ames agt. Webbers*, 8 *Wend.*, 545; *Bacon agt. Cropsey*, 3 *Seld.*, 195.) Even Cohen, the defendant in the original suit, could not have availed himself of the fact that another action was pending in Georgia for the same cause of action, by pleading it in bar. (*Walsh agt. Dur-*

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kin, 12 John., 99; Brown agt. Joy, 9 id., 221.) Moreover, it would appear that Cohen was surrendered by his bail in Georgia, after his escape from the defendant, and after this action was commenced.

The plaintiffs' demurrers to the matters stated in the answer, by way of a second and third defence, must be sustained, and those parts of the answer must be overruled, with costs.

NEW YORK SUPERIOR COURT.

RICHARD M. HOBBS agt. ELLEANORA FRANCAIS.

The court will not interfere, by injunction, to protect a party in the use of *trade marks*, which are employed to deceive the public, and to deceive them by fraudulent representations contained in the labels and devices which are claimed to constitute wholly, or in part, such trade marks. (*Following the case of Partridge agt. Menck, 1 Howard's Appeal Cases, 547.*)

New York Special Term, September, 1860.

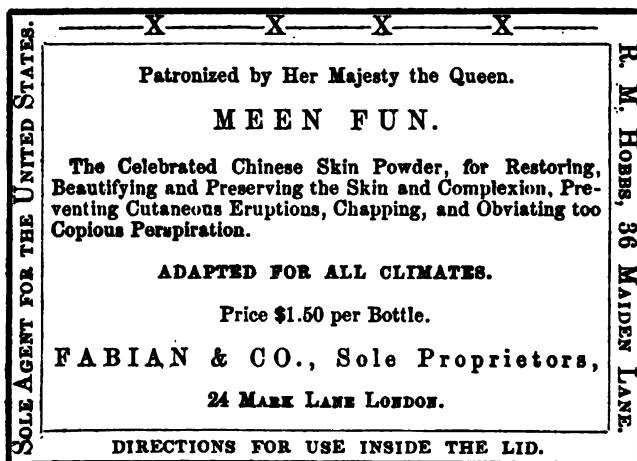
THE plaintiff moves for an injunction restraining the defendant from violating his trade mark.

The plaintiff deposes that he and Bentham Fabian, under the firm name of Fabian & Co., in 1846, "commenced the manufacture and sale, in the city of New York, of a certain powder for beautifying the complexion and skin;" that they then adopted as the name of the said article the words "Meen Fun;" and also devised a label with that name, and certain devices and trade marks upon it, to put upon the boxes and packages containing said article so manufactured by them; that they sold said article under said name of "Meen Fun," until 1848, when Fabian sold and transferred to Hobbs his interest in said business, and the right to use said name, label, devices and trade marks, and the said name of Fabian & Co.

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That the plaintiff has continued to make and sell said article under said name, &c., from that time until the present; it has acquired a reputation, and become generally known by said name, and the sales of it have been large and profitable. That during 1860 the defendant has made and sold an article of skin powder, put up in boxes like the plaintiff's, and has placed on them labels closely imitating the plaintiff's, with the words "Meen Fun" thereon; that this is done, and is calculated to deceive dealers, and has induced many to believe that such article is manufactured by the plaintiff, &c.

The complaint contains a copy of each label. The words on the plaintiff's label are as follows, viz.:



The skin powder manufactured by both parties is put up in boxes of uniform size, and the above label is pasted by the plaintiff on the front of the box. He also uses another label, which extends across the back of the box, and across each end of it to the front. On one end of the latter label is the word "S T A M P," and on the other the word "Office." In the centre of it, in the form of a circle, are the words "D. Y." S I X P E N C E." On the left of

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this circle are the words and figures "Value above, 2s. 6d.," and on the right of it the words and figures "Not exceeding 4s."

The label used by the defendant is substantially a facsimile of the plaintiff's, with the following exceptions, viz., in lieu of the words "Patronized by Her Majesty the Queen," the defendant has the words "Patronized by Her Majesty the Empress." The concluding part of the defendant's label has the words :

"Sole Proprietor,

E. FRANCAISE & Co.,

77 Chansee d'Anten."

and on the right hand margin the words

"N. C. U. R. T. I. S., 487 Broadway."

The defendant deposes that at the time she was ordering her labels to be printed, the plaintiff was present, and knowing what she was about to do, and he then told her she must omit from such proposed label the name "Fabian & Co.," adding that if such name was used said Fabian & Co. would prosecute deponent; also that Meen Fun had been extensively made and sold in Philadelphia and New York for some years past, and distributed throughout the United States. That all the manufacturers use labels, in general design, color and arrangement of words like the plaintiff.

That such "labels have been used several years last past, as deponent believes, with the knowledge of said Hobbe, and without remonstrance by him."

Other affidavits depose to the manufacture and sale of "Meen Fun" for at least six years past, in New York and Philadelphia, by different persons, and the use of labels

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upon it substantially like the plaintiff's, except as to the name of the proprietors.

The complaint prays, *inter alia*, that the defendant be restrained from selling any article of her manufacture "bearing the name Meen Fun," or said trade mark or devices, or any imitation thereof of the said label of the plaintiff.

C. SHAFFER, *for plaintiff.*

E. W. DODGE, *for defendant.*

Bosworth, Chief Justice. The plaintiff's label is calculated to induce the belief, and probably was designed to induce the belief, that the article in the box on which it is pasted is manufactured in London; that the sole proprietors of it have their place of business at 24 Mark Lane, London; that it is intrinsically so excellent as to secure the patronage of Her Majesty the Queen; and that the labels have paid the stamp duty required by some English statute.

The truth is, that it is made in New York, and that her majesty the queen is probably ignorant of its virtues, or even of its existence.

In this respect there is a manifest intention to deceive and mislead the public.

Mr. Justice GARDINER in *Partridge agt. Menck* (*Howard's Appeal Cases*, 547), says that "the privilege of deceiving the public for their own benefit, is not a legitimate subject of commerce, and at all events if the maxim that he who asks equity must come with pure hands, is not altogether obsolete, the complainant has no right to invoke the extraordinary jurisdiction of a court of equity in favor of such a monopoly."

The plaintiff's label, instead of indicating that he is the manufacturer of the article covered by it, represents him

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to be the sole agent in the United States of the proprietors of it, and that their place of business is in London.

It appears by the defendant's affidavit, that it is the prevailing belief in this country that ladies' toilet articles of English or French manufacture, are superior to those made in this country, and that the demand for the former is much better than for the latter.

The plaintiff's labels therefore contain representations believed to be useful, and which must be known to be false; and to secure to the plaintiff by injunction an exclusive use of such a label, and the exclusive privilege of thereby deceiving the public, is an object to which a court of equity will not lend its aid.

The court does not refuse its aid in such a case from any regard to the defendant, who is using the same efforts and misrepresentations to deceive the public; but on the principle that it will not interfere to protect a party in the use of trade marks which are employed to deceive the public, and to deceive them by fraudulent representations contained in the labels and devices which are claimed to constitute wholly or in part such trade marks.

On this ground the motion for an injunction must be denied.

It can hardly be pretended that the words "Meen Fun" indicate the manufacturer. Their meaning, if they have any, is not made to appear. They are used to designate an article of skin powder, which, as the plaintiff's label represents, is prepared by Fabian & Co., in London, and for the sale of which in the United States the plaintiff is the sole agent. The words, "The celebrated Chinese Skin Powder," are not well adapted to denote that the article is prepared in New York or by Mr. Hobbs.

If it be true that no property can be acquired in words which only denote the nature or kind of the article, and not the goods, as being the manufacture or property of another; it is difficult to perceive on what grounds any

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person can be restrained from using the words above quoted, unless it be shown affirmatively that from the use made of them by a plaintiff, they are generally understood to mean that the article on which they are impressed is one of the plaintiff's manufacture.

That these words are understood to mean and represent that the article on which they are found is prepared by the plaintiff, is not established in this case.

But as the motion must be denied on the ground first stated, it is unimportant to enter into a full consideration of this branch of the case.

Motion denied.

NEW YORK SUPERIOR COURT.

THOMAS DUNHAM agt. THOMAS G. SHERMAN.

On the execution of a *commission* for the examination of witnesses in a foreign country (London), the *commissioner's fees* are properly *taxable*. *Solicitor's charges* for services (abroad) in execution of the commission are *not taxable*. Proper fees for the attendance of *witnesses* (abroad) are a necessary disbursement, and the amount of such fees prescribed by *our statute* are properly *taxable*. It *seems*, that where the papers present the question properly before the court, that if the fees of *witnesses* are regulated by the law of the country in which the *commission* is executed, and the attendance cannot be procured without payment of such fees, that should form the rule of allowance here.

New York Special Term, October, 1860.

MOTION for retaxation of costs.

Mr. BENEDICT, for plaintiff.

Mr. ABBOTT, for defendant.

HOFFMAN, Justice. The plaintiff sued out a commission to London, in which the defendant joined, so far as to exhibit cross-interrogatories. The commission was executed

Dunham agt. Sherman.

by a single commissioner, and it appears that the examination took place on the 8th and 9th days of December. His charge for executing it was £10 10s.

To this was added a bill of £28 18s. 8d., paid solicitor's bill, including payment of witnesses, making together £39 8s. 8d., or \$192.12, which has been allowed by the clerk. The bill of the solicitor is in detail, and contains for payment to seven witnesses (one from Scotland £8), the sum of £17 19s. The fees are £1 1s. to three witnesses, £2 2s. to three witnesses, and the £8 to one. The remainder is for the services of the solicitor employed by the plaintiff to superintend the execution of the commission. It is made up of items for attendances on the commissioner and on the witnesses, with sums paid for copies of the interrogatories and cross-interrogatories which some of the witnesses requested might be left with them for examination to refresh their recollection.

I. The commissioner's fees are expressly allowed by the amendment of 311th section of the Code, made in 1857. Justice CLERKE has considered them proper even before such amendment. (*Calvert* agt. *Finck*, 13 *How. R.*, 13.)

II. The proper fees for the attendance of witnesses is also a necessary disbursement. I agree with Justice SMITH in his views upon this point. (*Case* agt. *Price*, 17 *How. R.*, 348.)

But a difficulty exists as to the measure of such allowance. I am prepared to say that the attendance fee allowed in our fee bill (fifty cents) is proper to be taxed as to witnesses examined under a commission, and also the traveling fees when the distance is over three miles, as therein prescribed; on this basis the charge of the witness from Scotland, and of any other of the witnesses, might be allowed, had the affidavit been sufficient. (*Wheeler* agt. *Lozee*, 12 *How. R.*, 448, and cases.)

A witness traveling from another state to be examined here, is entitled to his traveling fees from the boundary

Demarest agt. Ray.

line within the state to the place of trial, the distance to be estimated by the nearest usual travelled route. (*Wheeler agt. Lozee*, 12 *How. R.*, 448.)

I am inclined to think that if the fees of witnesses are regulated by the law of the country in which a commission is executed, and the attendance cannot be procured without payment of such fees, that should form the rule of allowance here. The case is not so before me as that I can pass upon the question.

III. There can be no ground for allowing the charges of the solicitor employed abroad. Had the attorney on record been present, he could have got nothing specifically for the services. An allowance has been made in this case. Expenditures of this description must be borne by the party himself, as he bears counsel fees.

The taxation must be readjusted, by allowing the commissioner's fees, £10 10s., disallowing the solicitor's charges for services, £11 9s. 8d., and also the £17 9s. for witnesses, but with liberty to the plaintiff to have the fees of witnesses adjusted upon the basis of the fee bill of our state, as before pointed out. Order for retaxation.

SUPREME COURT.

NICHOLAS L. DEMAREST and others agt. ROBERT RAY and others, executors, &c.

A *sale* (of real estate) may be made as well by an *executory contract*, as by a *deed* of present *bargain and sale*.

New York General Term, September, 1859.

By the court, ROOSEVELT, Justice. This is a case agreed upon, and submitted, under the Code, without pleading or

Demarest agt. Ray.

arguments. We have given it all the "consideration" which, without the aid of counsel, we could conveniently bestow, and have come to the conclusion that the points insisted on by the defendants are not well founded.

Mr. Richard Ray, by his will, authorized the executors, if they should consider it advisable, "to sell such number of lots, not exceeding twenty," of twenty-five by one hundred feet, as might be necessary to pay charges and assessments.

A sale may be made as well by an executory contract as by a deed of present bargain and sale. The contract in question, therefore, being authorized by the will, was to the extent of the number of square feet embraced in and subject to the contingency of its possible non-fulfillment, an execution of the power, especially if, as in this case, the vendee was let into actual possession, and subsequent purchasers were duly informed of the fact. The deed, in such case, when delivered, relates back to the contract, and has the same effect against subsequent purchasers with notice, as if it had been delivered on the day of the sale.

The defendants knew that the power of the executors had been conditionally exhausted. They took their deeds, therefore, subject to the chance of their being in part inoperative, in case the sales made to their predecessors should be consummated by a fulfillment of the conditions.

Judgment for plaintiffs, declaring their right and title to be paramount to those of the defendants, and that the deeds to the plaintiffs are "legal, valid and binding, and have conveyed to and vested in the plaintiffs the title of the lots therein mentioned in fee."

Dibblee agt. Maillard.

SUPREME COURT.

WILLIAM DIBBLEE agt. HENRY MAILLARD.

Report of referee set aside as against the weight of admissible evidence, and new trial ordered.

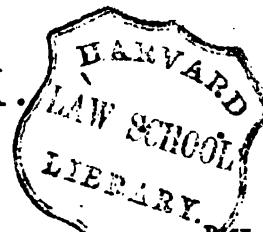
New York General Term, September, 1859.

By the court, ROOSEVELT, Justice. Although the sum awarded by the referee (\$250) is not excessive in itself, it is out of proportion to the damage proved. We think the referee, while justly rejecting so much of the claim as was founded on the alleged injury resulting from heat, and from the condensed steam which penetrated the roof of the shed, which the plaintiff himself had constructed against the defendant's wall, instead of building a wall of his own, has nevertheless unconsciously permitted the evidence on that point to aggravate the amount allowed by him for the alleged injury and annoyance in other respects, from the "soot, smoke, steam and vapor which came from the chimney and steam escape pipe, into the yard and back windows of plaintiff's house."

We are reluctantly, therefore, compelled to set aside the report as against the weight of (admissible) evidence, and to order a new trial on payment of costs.

Order accordingly.

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